Supreme Court, U.S.
FILED
00 1302 FEB 13 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

STATE OF NEBRASKA,

Petitioner,

v.

JEREMY SHEETS,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

99pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1.

May a statement made to law enforcement (1) with full benefit of counsel prior to and during the giving of the statement, (2) which incriminates the declarant in exactly the same level of crime as the defendant, (3) in which the police employ no leading questions in taking the statement, (4) in which there is absolutely no evidence of police intimidation of the declarant, (5) in which the declarant was provided no information regarding the crime by police, and (6) in which the declarant clearly understood that he had something to lose by being untruthful in his statement, be introduced at trial in evidence against a criminal defendant without offending the Confrontation Clause if the declarant died prior to trial?

2.

If truth is the goal of a criminal trial, then is not the accuracy of a statement offered in evidence of at least equal significance to the environment in which it was obtained? Should not the scope of the information considered in determining the "indicia of reliability" of a statement be expanded to include evidence which tends to corroborate the accuracy of the proffered statement, instead of being limited to evidence of the environment in which that statement was offered, when resolving the Confrontation Clause implications of that statement?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF THE BASIS OF JURISDICTION ... 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 17

QUESTION #1 17

I. Rule 10 considerations: This case represents the exception that proves the rule announced by the Court in *Lilly v. Virginia, Lee v. Illinois,* and *Ohio v. Roberts* 18

II. *Lilly* distinguished 20

III. *Lee* distinguished 25

QUESTION #2 26

I. Indicia of reliability vs. cross-examination 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) 27

Lee v. Illinois, 476 U.S. 530 (1986) ..... *passim*

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 233 (1999) ..... *passim*

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 594 (1980) 19, 20

State of Nebraska v. Sheets, 260 Neb. 325, 618 N.W.2d 117 (2000) 1

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

NEB. REV. STAT. § 28-303 25

CONSTITUTIONAL CONSIDERATIONS

Constitution of the United States of America, Art. VI. 1

OPINION BELOW

The opinion in question is reported as *State of Nebraska v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). (App. 1)

The opinion of the state trial court is not reported. (App. 57)

STATEMENT OF THE BASIS OF JURISDICTION

(i)

On September 15, 2000, the opinion of the Nebraska Supreme Court was filed. (App. 1)

(ii)

On November 15, 2000, the Nebraska Supreme Court denied the State of Nebraska's motion for rehearing. (App. 55) On that same date, the Nebraska Supreme Court also stayed its mandate in this matter pending the State of Nebraska seeking a writ of certiorari from this Court. (App. 56)

(iii)

The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; . . . " *Constitution of the United States of America*, Art. VI.

STATEMENT OF THE CASE

Because this Court's opinions in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 233 (1999) and *Lee v. Illinois*, 476 U.S. 530, 543 (1986) indicate that the resolution of the federal constitutional question presented

hinges upon a detailed analysis of the facts of the case, we offer an extensive rendition of the facts which underlie this question, drawn from the state court trial record.

Kenyatta's disappearance

On September 23, 1992, Kenyatta Bush was seventeen years of age and had begun her senior year at North High School, located at 36th and Ames, in Omaha, Douglas County, Nebraska. (168:19-169:3; 168:21-24) She was an honor student with a desire to go on to college. (169:4-12) She was a candidate for homecoming queen. (170:2-10) She had a part-time job at Skyline Manor Retirement Home. (171:16-18)

At approximately 8:30 a.m. on September 23, 1992, Kenyatta Bush was at North High School and visited with Juanita Hangar-Johnson, the Guidance Director. (173:1-176:2) They spent five minutes talking about homecoming and all the events that were coming up. (176:2-6) Kenyatta didn't seem to have anything bothering her at that time. (176:7-9)

Tonja Carter, a classmate of Kenyatta's, also saw Kenyatta at school that morning sometime after 8:30. (178:2-179:22) Tonja observed Kenyatta by the doors leading to the parking lot as Tonja was eating. (180:4-181:3)

A short time later, Lori Shea, a North High teacher, noticed that Kenyatta was not in attendance at Lori Shea's 8:40 a.m. marketing class. (182:20-184:2) Ms. Shea expected to see Kenyatta in class that day because Kenyatta was a state officer of the Marketing Club and was supposed to pick up some letters and other items from Ms. Shea. (184:3-12) When Kenyatta did not arrive home that evening, her step-father, Mr. Stennis, checked with the school and found that Kenyatta had not been in any of her classes on the 23rd. (172:3-5; 190:2-9) Mr. Stennis found Kenyatta's car in the school parking lot, unlocked, with a parking ticket on it, and Kenyatta's book bag still inside the car. (188:12-190:2)

In the fall of 1992, Officer Ted B. Green was a police officer for the City of Omaha assigned to the youth services unit of the criminal investigations bureau, a unit that handles crimes involving minors: sexual assaults, child abuse, child neglect and missing juveniles. (234:1-235:11) Officer Green became involved with the investigation of the disappearance of Kenyatta Bush. (235:12-20) Officer Green noted that Kenyatta's disappearance did not resemble a runaway. (237:17-21) Officer Green discovered that the book Kenyatta needed for Lori Shea's marketing class was still in her book bag when it was discovered in Kenyatta's car. (240:12-18)

The discovery of Kenyatta's body

Ten days after Kenyatta's disappearance, on the morning of October 3, 1992, Gregory Eversoll, a grade school teacher and bicycling enthusiast, went for his usual bike ride from his home in Dundee toward the Fort Calhoun area. (198:4-200:20) While cycling, Mr. Eversoll turned down road P-51 and the brilliance of the fall colors caught his eyes and made him slow down. (200:21-203:14) At that time, Mr. Eversoll looked to the right and glimpsed something resembling a "stuffed figure" in blue jeans off to the right side of the road in the woods. (203:10-204:7) Mr. Eversoll continued for another fifteen feet before deciding he had to go back and investigate. (204:8-22) When he returned to the point where he made his first observation, Mr. Eversoll still could not clearly identify what it was he had observed from the roadside. (204:24) He dismounted his bicycle and crossed the roadside ditch. Still he could not clearly make out the object. (205:1) It was a densely forested area. (206:1) Therefore, Mr. Eversoll walked on into the woods. Not until he was three to five feet away from the object he had observed from the road did Mr. Eversoll realize that the object was a dead body. (205:5-8) Mr. Eversoll immediately went to a phone and called 911. (206:19-207:7)

Kenyatta's body was 28 feet from the edge of the road. (243:18)

On October 3, 1992, Mike Robinson was a patrol officer with the Washington County Sheriff's Department and had been with the department for approximately eleven years. (212:1-21) On that date he was called regarding a body that had been discovered in Washington County, Nebraska. (213:1-4) At that time, he proceeded four-tenths of a mile north of the intersection of County Roads P-340 and P-51 and undertook to secure the scene. (213:5-216:4) Sergeant Robinson secured an area around the body with crime scene tape and blocked the road which ran by the scene a half mile in each direction to control access to the location. (216:5-11) Once secured, no one could observe the scene from the location of the law enforcement roadblocks and no media were allowed to get in and observe or video the scene. (216:11-217:1)

Sergeant Robinson then waited for the Omaha Police Department to arrive and take over the investigation. (225:14-17)

On October 3, 1992, Kevin Willis was a road deputy with the Washington County Sheriff's Office. (229:2-7) At approximately 9:25 a.m. Deputy Willis received a call regarding a body that had been discovered on North River Road. (229:4-15) Deputy Willis, with Deputy Rick Hillman following behind, responded to the call in a marked patrol car. (229:16-230:5) Deputy Willis assisted in the securing of the crime scene and of the road leading to the scene. (231:2-232:4) Nobody would have had the opportunity to view the crime scene from the road and there were no unauthorized personnel at the crime scene. (232:3-14)

The investigation

Officer Green of the Omaha Police Department arrived on the crime scene at around eleven. (240:19-241:17) The crime scene had been secured before he got there. (241:24-242:1)

Because of the nature of Kenyatta's injuries and the absence of any indication of large quantities of blood at that location, Officer Green concluded that Kenyatta's body had been placed at that location after she had been murdered. (245:2-247:11)

There was no evidence of struggle at the location where the body was discovered. (247:12)

Furthermore, the body was apparently carried to its resting place as there were no indications, either on the body or along the path from the road to where the body was discovered, that Kenyatta's body had been dragged from the road to the place where it was found. (247:16-249:10)

With the discovery of the body, the investigation turned into a homicide investigation. (261:1-4) When the body was turned over to the Omaha Police Department, Officer Kathryn Hearn of the homicide bureau took charge of the investigation. (262:4-10) X-rays of the body confirmed it was Kenyatta Bush. (263:1-11) Officer Hearn also believed, due to the absence of blood at the scene, that the body was discovered at a secondary crime scene and the murder occurred at another location. (264:19-265:2)

Officer Hearn observed that the body of Kenyatta was clad in blue jeans, blouse, bra, and panties, and Kenyatta's jeans had been pulled down below the hips. (267:13-269:8) Based on the weight of the body and the distance it was found from the road, Officer Hearn concluded that the body must have been carried from the road and placed on top of a bag of garbage at the location where it was found. (270:2-4)

Dr. Blain Roffman was a board certified coroner's pathologist in Douglas County for over twenty years. (305:1-306:25) He had performed over four thousand autopsies. (307:1-3) On October 3, 1992, Dr. Roffman was called to the scene where Kenyatta's body was discovered to obtain a preliminary idea of what had occurred. (307:11-16; 308:1) Dr. Roffman arrived at the scene in the late morning or early afternoon. (307:17-20)

Dr. Roffman observed that the body was lying in a lot of brush and garbage, on its back, and had suffered considerable decomposition. (308:4-8)

Dr. Roffman observed a large, gaping wound in the neck (308:9) and considerable decomposition of the flesh above that wound to include all of the facial tissue. (308:20-309:2) Dr. Roffman explained that if a body suffers significant trauma immediately prior to death, the flesh covering that area of the body traumatized will decompose at a faster rate than uninjured flesh. (310:7)

Based upon the amount of decomposition which had occurred, Dr. Roffman estimated that Kenyatta had been killed less than two weeks before her body was discovered. (310:23-311:2)

Dr. Roffman observed no blood in the area of the body. (311:11) That fact coupled with the nature of the wound he observed, which would have produced "a lot of blood", Dr. Roffman also concluded that Kenyatta had not died at the location where her body was found. (311:14-23)

On October 4, 1992, Dr. Roffman performed an autopsy on Kenyatta Bush at the Douglas County morgue. (312:3-16) Toxicology testing determined that Kenyatta's muscle tissue had a carbon monoxide level of 20 percent. That carbon monoxide level is not fatal, but does disclose that at some time near the time of her death Kenyatta had been exposed to carbon monoxide fumes. (315:24-317:9)

As Kenyatta's clothing was observed and removed in the course of the autopsy, Dr. Roffman observed no dirt or debris which would have been consistent with Kenyatta having been drug along the ground prior to being left where her body was discovered. (317:25-318:5)

Dr. Roffman noticed that there were "large areas of bruising and contusions" on the top or forward (anterior) areas of both of Kenyatta's thighs which had to have occurred prior to death, but only a matter of minutes prior to her death. (318:16-22; 320:5-13; 335:4) The bruises

on Kenyatta's thighs are consistent with bruising observed in women who were known to be the victims of sexual assaults where the rapist rested his weight upon his victim. (335:9-21)

Kenyatta suffered three to four stab wounds in the area of her throat. (323:18-324:11; 325:14) Two strokes which cut Kenyatta's throat from ear to ear. One stroke which stabbed into her bronchus and another which completely severed her bronchus. (323:20) Dr. Roffman noted that the trachea and larynx – which are often referred to as the "windpipe" – were absent from the body but there was an observable knife wound which completely severed the bronchus which begins immediately below the trachea and larynx and leads to the lungs. (322:9)

Dr. Roffman believed to a reasonable degree of medical certainty that Kenyatta Bush died as a result of knife wounds to Kenyatta's neck which resulted in the severing of major blood vessels and arteries, the trachea and larynx. (333:15-23)

A buck knife of ten inches in length would have been consistent with the wounds Kenyatta suffered. (325:6-9)

If Kenyatta had been face up on the ground at the time these wounds were inflicted, the nature of the wounds would have produced "significant" bleeding, with the blood from the severed vessels and tissue running down the victim's neck onto the ground, and arterial bleeding shooting forward in the direction of Kenyatta's assailant. (328:3-12) In all likelihood, some of this arterial bleeding would have struck an assailant lying on top of Kenyatta. (328:18)

Dr. Reena Roy was a forensic serologist with the Nebraska State Patrol Criminalistic Laboratory in Lincoln, Nebraska. (365:5-24) In November of 1992, Dr. Roy was given the jeans, blouse, bra, and panties of Kenyatta Bush as well as an envelope containing pubic hairs and vaginal swabs. (372:7-20) Dr. Roy examined these items for semen but did not find any. (378:2-7) Because sperm or semen would not be able to survive past 72 hours in a live victim of rape and only twelve hours in a deceased

person, Dr. Roy felt that she could not draw any conclusions whether or not Kenyatta had been sexually assaulted. (380:11-384:15) Dr. Roy also noted that if a woman was killed after a rape and kept in a lying position, semen would not drain from her vagina into her panties. (385:16-386:9)

Dr. Roy examined the pubic hair sample that was sent to her. (380:2-3) However, Dr. Roy further noted that it is very rare to find foreign hair in a rape victim's pubic combings, so it could not be concluded from the want of such hair that Kenyatta was not sexually assaulted. (387:15-22)

Dr. Robert Hall, a certified forensic entomologist and professor at the University of Missouri in Columbia, was contacted by the Omaha Police Department to aid in the investigation of Kenyatta Bush. (283:17-288:16) The field of forensic medical/criminal entomology concerns the use of insects to give us information about the time of death and occasionally the site of death. (287:11; 291:1) Dr. Hall received a very thorough collection of entomological specimens from the crime scene and the body, and upon examination of those specimens he estimated that flies had reached Kenyatta's body and laid eggs on the body on the afternoon of September 24, 1992. (301:21) It is not uncommon that flies are not attracted to a human body for the first 24 hours after death. (303:3)

A citizen contacts police

Officer Michael Butera first became involved with the investigation of Kenyatta Bush's murder in September of 1993, one year after Kenyatta's disappearance. At that time Officer Butera became the supervisor of a task force of two Omaha police detectives, a Nebraska State Patrol investigator, and an FBI agent working on the Kenyatta Bush case. (454:14-455:3)

On September 17, 1996, Officer Butera was working as the midnight supervisor in charge of the investigation bureau when Barb Olson reported to Omaha police that

Adam Barnett had told her son-in-law, Jason, that he and a friend were responsible for Kenyatta Bush's murder. (457:21-458:4) Prior to that report, the names of Adam Barnett or Jeremy Sheets had never been a part of the investigation of Kenyatta's murder. (457:10-12)

Officers Michael Butera, Bill Jadlowski, Kevan Barbour, and Felands Marion were assigned to follow up on the information that Barb Olson had provided and they re-interviewed her as well as taking taped statements from Ms. Olson, her son-in-law, Jason LaNoue, and her daughter, Richelle LaNoue. (459:12-460:12) Based on the information received, Officer Butera believed the next step in the investigation was to attempt to confirm the statements made by Adam Barnett that he and Jeremy Sheets were involved in the murder of Kenyatta Bush. (461:9-13)

Richelle LaNoue agreed to wear a concealed radio wire and meet again with Adam Barnett. (461:16-462:23) Based on the confirming information provided by the wire, Officer Butera set up a surveillance of Adam Barnett, followed him, eventually made contact with him, and arrested him for outstanding warrants and driving during suspension. (463:1-464:8)

The process which produced the Barnett statement

On Friday, September 27, 1996, Barnett was taken to Central Police Headquarters and placed in an interview room. (464:9-16) Within five minutes, Officers Butera and Jadlowski joined Barnett in the interview room, advised Barnett of his Miranda rights, and began interviewing him. (464:17-20) Barnett appeared ready to talk. (467:9-12)

These officers did not threaten Barnett, suggest to Barnett what it was they expected Barnett to tell them or share with him any details of Kenyatta's death, the discovery of her body or the condition of her body. (467:13-469:1; 471:2-13)

In the course of this first interview, Barnett requested an attorney, the interrogation ended immediately, and Barnett was provided a private room and a telephone with which to contact legal counsel. (469:3-9) When Barnett was unsuccessful in obtaining the services of an attorney through his own efforts, a judge of the Douglas County Court was contacted and an attorney, Mr. Chris Kelly, was appointed to represent Barnett. (469:14-470-1; 418:25)

Attorney Kelly arrived and took the opportunity to speak privately with Barnett for up to two hours. (422:10-18) Attorney Kelly left Barnett, spoke with prosecutors and police, was provided the opportunity to listen to the audio tape created in the course of Richelle LaNoue's earlier conversation with Barnett, and then had further discussions with his client. (422:24-423:17) After listening to the tape, Mr. Kelly and Barnett spoke again in private, and all meetings ceased for the evening. (423:2) Barnett was held in jail overnight, but police had no further discussions regarding the case with Barnett on that date. (470:5-16)

Attorney Kelly had made arrangements with police that Barnett might phone him on the following morning, Saturday, September 28, 1996, and that call was made by Barnett to Attorney Kelly at approximately 10:30 a.m. (424:3-11) Attorney Kelly then went back to the Omaha Police Department and again spoke privately with Barnett before noon. (425:8-15; 470:24-471:1) Attorney Kelly then had additional conversations with prosecutors, and then again met privately with Barnett. (425:15)

After this series of private meetings between Attorney Kelly and Barnett, at approximately 2:00 p.m. on Saturday, September 28, 1996, Barnett and Attorney Kelly met with police to discuss the case further. (425:19-426:6) Attorney Kelly was present throughout that meeting with police and characterized it as an interview rather than an interrogation. (426:7-20)

In the course of that interview, Barnett was afforded the opportunity to give a narrative statement to police of

his knowledge of the matter. During the course of that interview, Attorney Kelly testified police would only "occasionally ask a question for clarification purposes." (427:5)

After proceeding with his rendition of events for approximately an hour and a half, Barnett "slid his chair back and put his head down and began emotionally – began crying." (427:13-428:3) Attorney Kelly asked that the interview cease at that point, and police "immediately" ceased the interview and left Attorney Kelly and Barnett in private. (428:7-12)

Attorney Kelly was present throughout the interview. At no point was Adam Barnett threatened, browbeaten, told that the officers did not accept his story, told that he would have to do better than this, or told details the officers expected him to say or fed any information. (428:13-429:3) Officers never told Barnett the condition of Kenyatta Bush's body, the location of the body, the cause of death, or any information about the homicide investigation. (429:4-17)

From the time that Mr. Kelly became appointed on the case until September 28th at 10:00 p.m., Officer Butera was not aware of Omaha Police Officers having any contact with Barnett outside the presence of his attorney. (470:14-23)

On the evening of September 28, 1996, with Mr. Kelly's assistance, Adam Barnett reached a plea agreement with the State. (432:6-435:19) Under the agreement, Barnett was expected to be truthful and to testify truthfully at any subsequent trials. (435:20-436:6) In exchange, Barnett would be charged with second degree murder instead of first degree murder. (437:20-438:22) Barnett was seventeen at the time of the killing and thus his age made him ineligible for the death penalty. (50:17-51:14) There were no promises as to what Barnett's sentence would be and it potentially ranged from ten years to life imprisonment. (438:25-440:3)

At that point, Officers Jadlowski and Butera entered the room, set up a tape machine, and recorded a second statement from Barnett. (436:8-11; 472:22-473:7)

The Barnett statement

In his taped statement, Barnett gave the following account of the events surrounding the abduction and murder of Kenyatta Bush. (E5, 1-38:32,32)

In 1992, Barnett and Jeremy Sheets were the very best of friends.

> [Jeremy Sheets] was everything. I would have fucking – I would have walked over hot coals for him, you know. I went to Kearney. I had nobody else. * * * I cared about my mom but him, you know, I would have done anything for him.

(519:3-13)

In the early morning of September 23, 1992, Barnett and Jeremy Sheets were in Sheets' car. They were cruising around Omaha. (480:12-23) The two hatched a plan:

> [Sheets] said he wanted to find – basically we came to the decision that we wanted to find a black chick. You know, we could rape her and fuck her, you know, and just make her – you know, make ourselves feel better, make – just because she was black. It was all because we wanted to fuck a black girl.

(485:9)

> [W]e hated niggers; how much we'd just like to get one, you know, just show – show them, you know, that they shouldn't be fucking with our white women. * * * At the time, you know, most of the white girls we knew were going out with black guys, and it really pissed us off. So, you know, we thought we could – you know, we might as well go out and rape a black bitch. They're fucking our women, we might as well fuck their women.

(485:23-456:9)

> We drove up to North High * * * There she was out there. There was nobody else out there. * * * Jeremy [Sheets] said there's the one. We can grab her.

(481:1)

> We pulled up and she was standing on the sidewalk here getting ready to cross the street over to – from over here to where the cars are parked, where the cars are parked.
>
> We just pulled up right in front of her and [Sheets] jumped out of [the passenger side of] the car. He grabbed her first and I was right – I was out the driver's side door.

(487:16) Kenyatta only had time to yell for help once before she was in the car. (488:21-489:1)

> [W]e grabbed her, took – got her into the car. I was driving. Jeremy was in the back seat with her.

(481:7)

> She was struggling a little bit, man. She's saying get off me, get off me, and [Sheets is] saying shut the fuck up, nigger bitch. Man, I'll stick this fucking scarf in your mouth. And she's like – she's like why? What did I do? Then he stuck the scarf in her mouth, put his arm around her – around her shoulder, and held the scarf in her mouth.

(489:11) Barnett and Sheets had previously determined to take their victim, when caught, to Dodge Park. (490:1)

> We got her out of the car. We walked about a half a mile up the trail, and we decided we were going to rape her right there.

(481:22) Once arrived at a satisfactory location, chosen by Sheets, Barnett and Sheets "[j]ust threw her down". (494:4) Barnett, who weighed over 200 pounds, held Kenyatta to the ground by kneeling above Kenyatta's head, placing his knees on her shoulders (494:21) and pinning

her arms down with his hands. (495:2) Sheets removed enough of Kenyatta's clothing to rape her. (495:5-22)

"[S]heets proceeded to have sex with her for like ten minutes." (481:24) "I remember [Sheets] saying you nigger bitch, nigger bitch. We're gonna hurt you, you nigger bitch." (496:12)

> And then he started beating her. He had his knife in his hand. It wasn't opened, it was just – it was folded shut, using it sort of like to make his hand more like a rock, you know. * * * And I was holding her down and he was beating her. He didn't stop. He just kept beating her. Finally, I stood up and I took about three steps back.

(482:1-9)

> [Sheets] said I'm gonna kill this nigger bitch. You got a problem with that?

(498:15)

> That's when [Sheets] took out – thats when [Sheets] took the open blade of the knife out; stabbed her in the upper torso.

(482:10)

Barnett watched as Sheets stabbed Kenyatta "three or four" times, while Sheets "was still sexually inside her." (500:12-23) (504:6)

> I just stood there and did nothing, and the reason I didn't do nothing is – is because she was black. If it would have been a white girl, I probably would have stopped him, but I didn't.

(481:22-482:15)

> After stabbing Kenyatta, Sheets continued his rape of her body. (502:19-503:8)
>
> I was thinking that she deserved everything she got when she was black, but it really disgusted me when [Sheets] – when he kept having sex [after he killed her].
>
> When Sheets finally finished with her, "[Sheets] just said he didn't want to leave her right here where everything had took place." (505:2)

> [Sheets] said we need to get back – go back to the car, unlock the trunk, get the garbage bag out so it wouldn't make a big mess in his car. He didn't want to clean up a lot of mess.

(504:19)

> As the two walked back to Sheets' car they joked about their accomplishment.
>
> [Sheets] was like, God, that was good. That gave me a fucking boner, man. * * * I just couldn't help but laugh at it. No matter what [Sheets] said, you know, I was laughing.

(505:18)

When they got back to the parking area, and obtained the garbage bag, Sheets walked to the river and threw in the knife. (523:10-22) They then walked back to where Kenyatta's body had been left, covered Kenyatta's body with a garbage bag, carried her body back to Sheets' car, placed the body in the trunk, drove to another location near the park, carried the body into the woods and dumped it. (482:17-483:10; 509:16)

After cleaning up the trunk of the car and burning the garbage bag and Sheets' clothes, they discussed their reactions to what they had done. "[Sheets] told me how good it felt. You know, how it sort of gave him a boner." (483:21) "[Sheets] was talking about how great it was; how good it felt; how he'd like to do it again." (516:6) "[Sheets] was happy. It was giggles." (517:17)

Barnett stated that he now felt remorse for what he had done. (526:17-19)

Attorney Kelly was present for the entire recorded statement and at no time did Officers Jadlowski and Butera ever tell Barnett any details or information of the Kenyatta Bush homicide or suggest what Barnett should say. (437:9-15) At no time did Mr. Kelly perceive that the officers were dissatisfied with what Barnett had told them. (451:19-452:1) On November 13, 1996, Adam Barnett committed suicide while housed in the Washington County Jail and was thus not available to testify at Sheets' trial. (33:7-14)

Other admissions

In addition to his counseled statement to Omaha Police, Barnett had admitted his involvement in the Kenyatta Bush murder to Jason LaNoue (525:22), Richelle LaNoue (526:2), and Christine "Chrissy" Kelly (526:7).

Barnett later confirmed that he and Sheets were responsible for Kenyatta's murder to his uncle, Thomas Stepanek. (61:1-8) He did state to his uncle that "he didn't do it," but only in the sense that he was not the one who stabbed her. (63:15-64:2) A distinction also discussed in his taped statement. (482:10)

Barnett's cell mate, Mr. Marschinke, also testified that Barnett told him that Barnett was present when Sheets killed Kenyatta Bush and he was worried about what was going to happen to him. (33:11-35:3) Barnett had earlier indicated that he feared for his safety in prison, if it was discovered that his motivation for this crime was purely racial. (519:23-520:4)

Additional corroboration

Officer Butera received employment records from Kentucky Fried Chicken indicating that Barnett and Sheets were both employed in the Omaha area at the time Kenyatta was killed. (537:9-538:16)

The trial court's ruling

At trial the State sought to offer into evidence the recording and transcription of Barnett's statements. A hearing was conducted regarding the circumstances surrounding the taking of Barnett's statements. The trial court reviewed the record of the hearing and among its findings was the following:

> No leading questions, suggesting the answer, were asked of Barnett. Many of his answers, especially the most significant, were lengthy and narrative. No question, either by their

> wording or by the tone of the voice, are in any way coercive in nature.

(App. 63) The state trial court ultimately found: "The State has met its burden of demonstrating trustworthiness and reliability of both statements." (App. 64) The statements were admitted into evidence at Sheets' trial.

The Nebraska Supreme Court's ruling

On direct appeal the Nebraska Supreme Court concluded: "[T]he presumption of unreliability has not been rebutted [by the State]." (App. 32) The case was reversed and remanded for a new trial. (App. 35)

This petition followed.

REASONS FOR GRANTING THE WRIT

QUESTION #1

May a statement made to law enforcement (1) with full benefit of counsel prior to and during the giving of the statement, (2) which incriminates the declarant in exactly the same level of crime as the defendant, (3) in which the police employ no leading questions in taking the statement, (4) in which there is absolutely no evidence of police intimidation of the declarant, (5) in which the declarant was provided no information regarding the crime by police, and (6) in which the declarant clearly understood that he had something to lose by being untruthful in his statement, be introduced at trial in evidence against a criminal defendant without offending the Confrontation Clause, if the declarant died prior to trial?

I.

Rule 10 considerations:

This case represents the exception that proves the rule announced by the Court in *Lilly v. Virginia*, *Lee v. Illinois*, and *Ohio v. Roberts*.

This case presents an important question of federal constitutional law which this court most recently addressed, but did not resolve, in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 233 (1999). *Lilly* concluded with a plurality opinion which indicated that a set of circumstances could exist which would allow the statement of an unavailable co-actor to be admitted into evidence against a criminal defendant without offending the Confrontation Clause. "The Commonwealth correctly notes that 'the presumption of unreliability that attaches to codefendant's confessions . . . may be rebutted.' " 119 S.Ct. at 1984, citing *Lee v. Illinois*, 476 U.S. 530, 543, 106 S.Ct. 2096, 90 L.Ed.2d 514 (1986).

We believe the set of circumstances anticipated by this Court's opinions in *Lilly* and *Lee* are present in this case. We believe that a rational, pragmatic application of the truth seeking principals which form the basis of our historical analysis of the Confrontation Clause should allow the introduction into evidence of the statement here in question.

Furthermore, although we are unaware of a split of authority among the circuit courts upon the *standard* to be employed on this question, members of this Court have previously noted the *results* of the application of this standard has produced varying results.

> [O]ur precedent does not compel the broad holding suggested by the plurality today. [citations omitted] Indeed, several Courts of Appeals have admitted custodial confessions that *equally inculpate both the declarant and the defendant*, and I see no reason for us to preclude consideration of these or similar statements . . .

Lilly, 119 S.Ct. at 1904 (Opinion of Rehnquist, C.J.; O'Connor, J., and Kennedy, J. joining in the opinion) (emphasis added).

That same factual situation is presented here, but the Nebraska Supreme Court found it to be in violation of the Confrontation Clause to admit Barnett's statement into evidence, relying upon *Lilly* and the Confrontation Clause opinions of this Court which preceded *Lilly*.

The plurality opinion in *Lilly* relied upon the standard articulated in this Court's opinion in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 594 (1980), framing the question in these terms: Whether the statement offered contains "particularized guarantees of trustworthiness." *Lilly*, 119 S.Ct. at 1984. We believe, as the state trial court found, that those particularized guarantees of trustworthiness required by the Confrontation Clause are present here.

Lilly, *Lee*, and *Roberts* all indicate that there are circumstances under which the discernment of the truth would be enhanced, and the Confrontation Clause not offended, by the introduction of the statement of an unavailable co-actor against a criminal defendant. That is where *Lilly* leaves us, still wondering what that appropriate set of circumstances would look like. We believe those circumstances are presented by this case.

We believe Barnett's statement was appropriately received into evidence by the state trial court in full satisfaction of the legitimate concerns of the Confrontation Clause. For this court to recognize that fact would be of immeasurable assistance to courts, prosecutors and defense counsel around this country in distinguishing those few situations which do satisfy the Confrontation Clause, from the many situations which obviously do not.

We believe the circumstances of this case represent the exception which *proves* the rule announced in *Lilly*, *Lee*, and *Roberts* that the presumption of unreliability can be rebutted and that standard is an adequate tool for the protection and evaluation of the requirements of the Confrontation Clause.

On the other hand, if the *actual practice* in our American courts is to be otherwise, if there is to be a universal prohibition against this type of evidence contrary to the rule articulated by *Lilly, Lee,* and *Roberts,* then *this* Court should be the body to affirmatively articulate that rule. That task should not be left to the guess work of the lower courts.

II.

Lilly distinguished

The facts and concerns which were specifically noted in *Lilly* and prompted the Court's remand are not present here.

A. A custodial statement, but one given with the full assistance of counsel.

The lead opinion in *Lilly* expresses a generic concern with "custodial" statements, but the lead opinion did not find that element *dispositive* of the question. For good or evil, many of these types of statements will be obtained in the course of law enforcement personnel's investigation of a crime. That fact alone should not be dispositive, and perhaps not even directly relevant, to the Confrontation Clause inquiry.

Nonetheless, we need to examine with some specificity the concerns with statements given while the declarant is in the custody of law enforcement officers because, when we do, we observe those concerns are not present in this case.

On Friday, September 27, 1996, Barnett was taken to Central Police Headquarters and placed in an interview room. (464:9-16) Within five minutes, Officers Butera and Jadlowski joined Barnett in the interview room, advised Barnett of his Miranda rights, and began interviewing him. (464:17-20) Barnett appeared ready to talk. (467:9-12)

These officers did not threaten Barnett, suggest to Barnett what it was they expected Barnett to tell them or

share with him any details of Kenyatta's death, the discovery of her body or the condition of her body. (467:13-469:1; 471:2-13)

In the course of this first interview, Barnett requested an attorney, the interrogation ended immediately, and Barnett was provided a private room and a telephone with which to contact legal counsel. (469:3-9) When Barnett was unsuccessful in obtaining the services of an attorney through his own efforts, a judge of the Douglas County Court was contacted and an attorney, Mr. Chris Kelly, was appointed to represent Barnett. (469:14-470:1; 418:25)

Attorney Kelly arrived and took the opportunity to speak privately with Barnett for up to two hours. (422:10-18) Attorney Kelly left Barnett, spoke with prosecutors and police, was provided the opportunity to listen to the audio tape created in the course of Richelle LaNoue's earlier conversation with Barnett, and then had further discussions with his client. (422:24-423:17) After listening to the tape, Mr. Kelly and Barnett spoke again in private, and all meetings ceased for the evening. (423:2) Barnett was held in jail overnight, but police had no further discussions regarding the case with Barnett on that date. (470:5-16)

Attorney Kelly had made arrangements with police that Barnett might phone him on the following morning, Saturday, September 28, 1996, and that call was made by Barnett to Attorney Kelly at approximately 10:30 a.m. (424:3-11) Attorney Kelly then went back to the Omaha Police Department and again spoke privately with Barnett before noon. (425:8-15; 470:24-471:1) Attorney Kelly then had additional conversations with prosecutors, and then again met privately with Barnett. (425:15)

After this series of private meetings between Attorney Kelly and Barnett, at approximately 2:00 p.m. on Saturday, September 28, 1996, Barnett and Attorney Kelly met with police to discuss the case further. (425:19-426:6) Attorney Kelly was present throughout that meeting with

police and characterized it as an interview rather than an interrogation. (426:7-20)

In the course of that interview, Barnett was afforded the opportunity to give a narrative statement to police of his knowledge of the matter. During the course of that interview, Attorney Kelly testified police would only "occasionally ask a question for clarification purposes." (427:5)

After proceeding with his rendition of events for approximately an hour and a half, Barnett "slid his chair back and put his head down and began emotionally – began crying." (427:13-428:3) Attorney Kelly asked that the interview cease at that point, and police "immediately" ceased the interview and left Attorney Kelly and Barnett in private. (428:7-12)

Attorney Kelly was present throughout the interview. At no point was Adam Barnett threatened, browbeaten, told that the officers did not accept his story, told that he would have to do better than this, or told details the officers expected him to say or fed any information. (428:13-429:3) Officers never told Barnett the condition of Kenyatta Bush's body, the location of the body, the cause of death, or any information about the homicide investigation. (429:4-17) Subsequently, Officers Jadlowski and Butera entered the room, set up a tape machine, and recorded a second statement from Barnett. (436:8-11; 472:22-473:7)

From the time that Mr. Kelly was appointed to represent Barnett until Saturday, September 28th at 10:00 p.m., Officer Butera was not aware of Omaha Police Officers having any contact with Barnett outside the presence of his attorney. (470:14-23)

In summary, Barnett was taken to a police station, advised of his rights, he requested counsel, discussions with law enforcement were *immediately* terminated upon that request, counsel was appointed for Barnett, Barnett had a significant period of time to meet privately with his counsel, and counsel was physically present during the discussions between his client and law enforcement

which produced the statement at issue here. One has to possess an irrationally negative view of government and the individuals sworn to uphold and enforce its laws to observe heavy handedness, evil intent or coercion in this scenario.

B. No leading questions

The lead opinion noted a specific concern that in the statement at issue in *Lilly* the declarant "was primarily responding to the officer's leading questions." 119 S.Ct. at 1901.

Leading questions played absolutely *no role* in obtaining Barnett's statement. The officers did not suggest to Barnett what it was they expected Barnett to tell them or share with him any details of Kenyatta's death, the discovery of her body or the condition of her body. (467:13-469:1; 471:2-13)

Barnett was afforded the opportunity to give a narrative statement to police of his knowledge of the matter. During the course of that interview, Attorney Kelly testified police would only "occasionally ask a question for clarification purposes." (427:5)

Attorney Kelly was present throughout the interviews. At no point was Adam Barnett threatened, browbeaten, told that the officers did not accept his story, told that he would have to do better than this, or told details the officers expected him to say or fed any information. (428:13-429:3) Officers never told Barnett the condition of Kenyatta Bush's body, the location of the body, the cause of death, or any information about the homicide investigation. (429:4-17)

These facts stand in stark contrast to the facts which prompted the Court's concerns in *Lilly*.

C. No attempt by Barnett to mitigate his level of participation while shifting blame to Sheets.

Perhaps most important, Barnett's statement did not attempt to reduce his responsibility for this crime in the process of describing Sheets' involvement.

The lead opinion in *Lilly* also noted a specific concern with the fact that the declarant in *Lilly* was being investigated for possible involvement in a series of crimes including the homicide at issue in *Lilly*. Yet in the *Lilly* declarant's statement, he assumed *absolutely no* responsibility for the homicide in question, but placed the blame for the homicide exclusively upon the defendant. "Thus, [the declarant] has a natural motive to attempt to exculpate himself as much as possible." 119 S.Ct. at 1901.

As Chief Justice Rehnquist pointed out, a strong argument can be made that the statement at issue in *Lilly* does not even qualify for consideration as a statement against penal interest. "Mark Lilly's statements inculpating his brother in the murder of De Filippis are not in the least against Mark's penal interest." 119 S.Ct. at 1904.

That is simply not the case with Barnett's statement. There was no attempt on Barnett's part to exculpate himself from any of the crimes involved in the death of Kenyatta Bush, *including her murder.* Barnett confessed his full participation in the planning, abduction, rape and murder of Kenyatta Bush. All he could have done to inculpate himself more would have been to have placed his hands upon those of Sheets as Sheets repeatedly drove the knife into Kenyatta's body. In Nebraska, that sort of teamwork is not necessary for one to be considered guilty of exactly the same crime of which Sheets was convicted. Barnett's statement, given after extensive consultation with his attorney,[1] described responsibility for

---

[1] There should be no legitimate question that Barnett was wholly aware of the legal implications of his statement. We hear no argument that Barnett was confused and thought he was

exactly the same crime of which Sheets now stands convicted, Murder in the First Degree. NEB. REV. STAT. § 28-303.[2]

This was not a case of an individual, under pressure from police, accepting blame for a small offense while attempting to shift blame for a major offense to another. Barnett's statement exposed both of the murderers of Kenyatta Bush. There is nothing exculpatory in that act.

D. No evidence of drugs or alcohol

The lead opinion notes yet another concern with the conditions surrounding the giving of the declarant's statement in *Lilly*: "[The declarant] also was obviously still under the influence of alcohol." 119 S.Ct. at 1901.

There is absolutely nothing upon this record which establishes or even hints that Barnett was under the influence of alcohol, or any other drugs, at the time his statement was made.

This concern of the lead opinion in *Lilly* is simply not present in this case.

III.

Lee distinguished

Lee v. Illinois, 476 U.S. 530, 543, 106 S.Ct. 2096, 90 L.Ed.2d 514 (1986) also involved a statement by an unavailable declarant which was offered in evidence

---

confessing to a lesser degree of offense than that attributed to Sheets.

[2] Prior to giving his statement, Barnett was told his statement would have to be accurate and truthful. (App. 4) If the state's representatives were satisfied the statement was accurate and truthful, it was agreed that Barnett would be allowed to plead guilty to the lesser offense of second degree murder. (App. 5) Thus, Barnett's statement might well have exposed him to prosecution for first degree murder, if he were discovered to have been untruthful.

against a co-actor. In *Lee*, the following concerns with the offered statement resulted in the majority's conclusion that the presumption of unreliability had not been rebutted. The declarant's statement was obtained only after police informed the declarant that a co-actor had confessed and the co-actor had personally implored the declarant to confess. 476 U.S. at 544. The statement was also "given in response to the questions of police, who, having already interrogated [the co-actor], no doubt knew what they were looking for, ... " *Id.*

In contrast to the situation in *Lee*, Barnett's statement was not motivated by the fact that Sheets had already confessed and incriminated Barnett. Barnett made his statement at a time when, but for Barnett's incriminating statements to friends, police had little or no knowledge of who was responsible for Kenyatta's abduction and murder. Furthermore, Barnett's statement was primarily narrative in nature, not the product of extensive and focused police questioning.

The facts found relevant in *Lee* are utterly different than the facts surrounding the statement here in question.

QUESTION #2

If truth is the goal of a criminal trial, then is not the accuracy of a statement offered in evidence of at least equal significance to the environment in which it was obtained? Should not the scope of the information considered in determining the "indicia of reliability" of a statement be expanded to include evidence which tends to corroborate the accuracy of the proffered statement, instead of being limited to evidence of the environment in which that statement was offered, when resolving the Confrontation Clause implications of that statement?

I.

Indicia of reliability vs. cross-examination

The Nebraska Supreme Court proceeded on the assumption that the "indicia of reliability" cannot include

evidence corroborating the accuracy of the statement, but must be limited to evidence of the circumstances surrounding the giving of the statement. (App. 21) We believe that to be an accurate reading of this Court's prior rulings on the subject. *Lilly*, 119 S.Ct. at 1900, *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). However, we question whether the needs of the Confrontation Clause require that standard, or whether a realistic examination of an America trial, as a whole, produces another conclusion.

If the truth is our ultimate goal, it is the factual accuracy of such a statement, not just the environment in which it is made, that should be the subject of vigorous testing and argument. Even if allowed into evidence, the defense has ample opportunity to bring their concerns with the credibility of the unavailable declarant to the attention of the defendant's jury by means other than cross-examination. We should not ignore that the question of an individual's credibility is merely one, collateral means of ultimately testing the *accuracy* of the proffered statement.

The fact that a plea bargain may have been struck with the declarant prior to the making of his statement could easily be placed before the jury. It was in this case. That leaves the defense free to argue the plea bargain had a great influence upon the credibility of the declarant and the accuracy of his statement, and the State with no declarant to deny it.

The fact that the declarant may be alleged to have recanted his statement can be placed before a jury. It was in this case. That leaves the defense free to argue the validity of the alleged recantations, and the State with no declarant to deny them.

The fact that the declarant may have expressed concerns about his safety in prison and the fact that the State had expressed a willingness to obtain protection for the declarant before the statement was made can be placed before a jury. It was in this case. That leaves the defense free to argue that such a promise impacted the credibility

of the declarant and the accuracy of the statement, and the State with no declarant to deny it.

None of these situations makes the State's burden easier. In fact, it makes the State's burden of convincing a jury of the defendant's guilt beyond a reasonable doubt all the more difficult. That is acceptable. The State should accept that burden if it elects to offer into evidence a statement of an unavailable witness, as it presently accepts the initial burden of convincing the trial court that the statement has sufficient indicia of reliability before it may even be accepted into evidence. However, placing potentially accurate information before a jury is how we profess to go about getting at the truth in this country. Denying a jury such information, when other means of attacking its credibility are readily available to the defense, does not further the search for truth.

The defense has alternatives available to it by which the credibility of an unavailable declarant may be called into question before a jury. Since it is the credibility of the unavailable declarant that would be tested by cross-examination, those alternatives should be weighed in the mix when determining the requirements of the Confrontation Clause.

Thus, we suggest that the appropriate focus of attention in these situations should be upon evidence tending to establish the probable *accuracy* of the statement in question, not whether it is the subject of cross-examination. That should be the heart of the *reliability* question that has troubled us throughout these cases. In that respect, we believe a re-evaluation of what evidence of reliability ought to be allowed into the mix in these situations is appropriate.

For example, Barnett's statement was chillingly consistent with the independent forensic understanding of the physical trauma and death suffered by Kenyatta and other facts surrounding her disappearance and the discovery of her body. There is no rational way Barnett could have been that accurate, unless he knew what he

was talking about, i.e., unless his statement was factually "reliable". Yet such evidence affirmatively was not considered in the determination of the "reliability" question. (App. 21)

> We request a re-evaluation of the *Wright* conclusion.
>
> [T]his Court tends to be overly concerned with theory and pronounced principals for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one.

Lee v. Illinois, 476 U.S. 530, 547-548 (1986) (Justice Blackmun, dissenting). We believe that in the real world, Barnett's statement may be introduced into evidence against Sheets, and the pursuit of truth furthered, without damage to the interests protected by the Confrontation Clause.

CONCLUSION

The statement given by Barnett was not the subject of the environmental defects and concerns which have understandably led to the exclusion of other custodial statements by unavailable declarants which also incriminate fellow actors in a crime.

This record also clearly demonstrates that the statement given by Barnett was in all probability accurate in its rendition of the trauma and death suffered by Kenyatta Bush, and the events which surrounded those acts.

The question is does the Confrontation Clause prohibit a jury from weighing that statement in its determination of Sheet's guilt for this crime? We do not believe

the Confrontation Clause is offended by the introduction of Barnett's statement in the context of this trial, and the search for truth is furthered by its introduction and consideration by a jury.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

Supreme Court of Nebraska

STATE of Nebraska, appellee,
v.
Jeremy C. SHEETS, appellant.

No. S-97-1069.

Sept. 15, 2000.

J. William Gallup, of Gallup & Schaefer, Omaha, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown, Lincoln, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Jeremy C. Sheets, was convicted on one count of murder in the first degree and one count of using a knife to commit a felony, and was sentenced to death on the murder charge. The crucial portion of the State's case, which was admitted into evidence, was the taped confession of Adam Barnett, an alleged accomplice to the crime. The confession was made pursuant to a plea agreement while Barnett was in custody. Statements in the confession implicated Sheets in the crimes. Barnett was not available to testify, as he committed suicide before trial. Sheets appealed, contending that the district court erred in admitting Barnett's taped confession. While this case was pending appeal, the U.S. Supreme Court, in June 1999, decided *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). We then sustained

the State's motion to submit supplemental briefs to discuss the impact of *Lilly*. These briefs were filed at the end of July 1999.

We determine that statements made in Barnett's confession do not fall within a firmly rooted hearsay exception or possess particularized guarantees of trustworthiness which would make cross-examination of marginal utility. Thus, we conclude that the admission into evidence of Barnett's taped confession violated Sheets' constitutional right to confrontation. Because the taped confession was the primary evidence against Sheets at trial, we conclude that the error was not harmless. Accordingly, we reverse, and remand for a new trial.

BACKGROUND

On September 23, 1992, Kenyatta Bush, a 17-year-old senior at North High School in Omaha, Nebraska, disappeared from the school campus. Bush's body was found 10 days later in a ditch in Washington County, Nebraska. A pathologist determined that Bush had suffered three to four stab wounds to her throat and that she died of the incised lacerations to her neck, which severed the trachea, larynx, and all major blood vessels. Bruises found on her body were consistent with sexual assault. Investigating officers determined that the murder had been committed at another location and that Bush's body had been moved to the place where it was found.

The murder was still under investigation when, on September 17, 1996, Omaha police received a report from Barb Olson that Barnett had told her son-in-law, Jason LaNoue, that Barnett and Sheets were involved in the

murder. The police then obtained statements from Olson; her daughter, Richelle LaNoue; and Jason LaNoue. As part of the investigation, Richelle LaNoue agreed to wear a concealed radio wire in order to secretly tape a conversation between herself and Barnett regarding the murder.

During the conversation between Richelle LaNoue and Barnett, Barnett implicated Sheets in the murder. Barnett stated that he had not actively participated in the crime, but had just driven the car. When Richelle LaNoue asked how Barnett could remain friends with Sheets, Barnett stated that "its not even you know, a (unclear) friendship anymore. He's had sex with my old lady and I don't know. . . . " Richelle then replied, "Yeah, [Barnett's girl friend] told me about that," and Barnett stated, "It's not even really a friendship really, it's sort of like (sighs)."

Barnett was taken into custody on September 27, 1996. Upon arrest, Barnett was taken to police headquarters and placed in an interview room. Two police officers informed Barnett of his *Miranda* rights, and Barnett agreed to speak with the officers. Barnett spoke with the officers for about 1 hour. During this time, he denied any involvement in Bush's murder and stated that Sheets had killed Bush. The interview terminated when Barnett asked to speak with an attorney.

A presiding judge appointed an attorney, who consulted with Barnett for several hours before Barnett was formally booked on a charge of homicide. On September 28, 1996, Barnett made an early morning request to detention personnel that he be allowed to contact his attorney. Barnett's attorney arrived at the police station around

noon, after which he consulted with Barnett for several hours. Barnett's attorney then contacted police detectives and informed them that Barnett wished to make a statement regarding his involvement in the murder.

During this second statement to police, Barnett maintained that on the day Bush disappeared, she willingly entered the car and agreed to drive around and smoke marijuana with Sheets and Barnett. Barnett stated that when the three arrived at Dodge Park, Barnett stopped to urinate and was separated from Sheets and Bush. Barnett stated that when he rejoined them, Sheets had pinned Bush to the ground and was stabbing her. Shortly after providing police with this information, Barnett began to cry, and his attorney terminated the interview.

Following the second interview, Barnett's attorney negotiated a plea agreement with the county attorney on Barnett's behalf. According to a letter setting out the terms of the agreement:

> Mr. Barnett agreed to the following terms and conditions:
>
> 1. To make a full and truthful statement to law enforcement regarding the events and participation of individuals involved in the homicide of Kenyatta Bush;
>
> 2. To cooperate with reasonable requests of law enforcement, to include a tour of the various crime scenes and to make a telephone call to Mr. Jeremy Sheets in Maine for law enforcement purposes; and,
>
> 3. To testify truthfully at any trial involving Mr. Sheets in this matter.

In consideration for his performance of the above conditions, it was stated to Mr. Barnett personally, with Detective Bill Jadlowski and [Barnett's attorney] present, that [the Douglas County Attorney] agree[d] to the following:

> 1. Mr. Barnett will be allowed to plead to the reduced charge of Murder in the Second Degree;
>
> 2. [The Douglas County Attorney] would make arrangements for [Barnett's] safety and well-being during the time of incarceration prior to disposition of his case in the District Court, and would make a recommendation to the Department of Corrections to benefit Mr. Barnett in terms of placement for his safety and well-being after his sentencing in his case.

It was also agreed that a use of a weapon charge would not be filed against Barnett. At trial, Barnett's attorney testified that the sentence Barnett would receive for second degree murder had never really been discussed. However, Barnett's attorney also stated that a minimum sentence was something that could be hoped for. Barnett's attorney also testified that he had been told prior to making the agreement that Barnett was going to be charged with first degree murder. After Barnett's attorney consulted with Barnett about the plea agreement, a deputy county attorney and an Omaha police detective advised Barnett of the plea agreement and what was expected of him in return. At around 10:40 p.m. on September 28, 1996, Barnett gave a tape-recorded confession to the police. The statement provided in part:

> [Barnett]: We were cruising around Omaha. It was earlier in the morning. We had been up

tripping acid all night, piggybacking them. Um, we decided to go out and find a girl that we could have sex with. We drove up through North High about 10 o'clock in the morning. There she was out there, there was nobody else out there, it was the middle of school. Jeremy said 'There's the one, we can grab her'. So we pulled the car over and we both got out of the car and we grabbed her. . . . I was driving, Jeremy was in the back seat with her, he had a handkerchief, he stuck it in her mouth, he sat back there and he held her. We proceeded to leave the school and we went down to Dodge Park. We parked, right by where I told you before.

[Officer]: Why don't you describe that location to me again as best you can will you?

[Barnett]: [Describes location in detail and sighs]. We got her out of the car, we walked about a half mile up the trail and we decided we were going to rape her right there. And we took off her clothes and he proceeded to have sex [with] her for like ten minutes. And then he started beating her, he had his knife in his hand, wasn't open – it was just – it was folded shut. Using it sort of like to make his hand more like a rock you know.

[Officer]: Uh huh (affirmative).

[Barnett]: (Sighs) And I was holding her down and he was beating her, he didn't stop, he kept beating her. Finally I stood up and I took about three steps back. (Lets out a breath) That's when he took out – that's when he took the open blade of the knife out, stabbed her in the upper torso. I just stood there and did nothing. The reason I didn't do nothing is (lets out a breath) is 'cause

she was black. If it would have been a white girl I probably would have stopped him, but I didn't. I just seen faces of other people and I thought she deserved it. Then we went – after it was over we went back to the car, we got the garbage bag, we put it over her head, he picked up the top of her, I picked up the bottom of her and we took her back to the car and we put her in the trunk and then we drove out of Dodge Park, took a right, I'm not exactly sure how far we drove, all I know is [we] drove not even two minutes (lets out a breath). Jeremy said this – this is the place right here, we can dump her right here. We got out of the car, we looked around to see if there was any other cars coming, and when there wasn't we opened up the trunk of the car, we took her off into the woods, I'm not exactly sure how far we went into the woods or how (pause)

[Officer]: You're doing fine. Just relax, if you're not exactly sure, you're not exactly sure. Just take a breath and relax.

[Barnett]: I'm not exactly sure how far. We dropped her body. We took the bag off her – we went back to the car. We got back to my house, we cleaned out the trunk the best we could, burned the bag, burned the clothes Jeremy had on. (pause) We sat down and we talked about what we had just done and how that we'd never talk about it again and we haven't.

At other points in the interview, when asked specifically about the removal of Bush's clothes, Barnett stated that Sheets removed them. Barnett also stated that Sheets, and not Barnett, had raped, beaten, and stabbed Bush. In the taped confession, Barnett provided statements that

the murder was racially motivated and expressed concern about his safety in prison when inmates found out he did not stop Sheets from killing Bush because she was black. One of the interviewing officers testified that Barnett had expressed similar concerns prior to the start of the interview and that Barnett had stated he did not want to go to the Douglas County Correctional Center.

After making his statements to the police, Barnett was placed in the Washington County jail. Around October 31, 1996, he made statements to other inmates at the jail indicating that he was concerned about his potential sentencing. The record also contains evidence that while in jail, Barnett recanted his statements on several occasions to a family member, his girl friend, a cellmate, and Sheets' wife. Pursuant to the plea agreement, Barnett made a telephone call to Sheets, which the record indicates did not produce any clearly incriminating statements from Sheets. Barnett refused to accompany police to the crime scene. The record is not clear if this was because Barnett was seeking a new attorney or because he was not intending to comply with the agreement.

On November 13, 1996, Barnett committed suicide in his jail cell. On February 25, 1997, a hearing was held in Douglas County District Court on the State's notice of intent to offer statements of unavailable witness at trial. Following the hearing, the district court issued an order determining that the State had met its burden of proof to demonstrate that Barnett's statements were trustworthy, finding the statements admissible under either Neb.Rev.Stat. § 27-804(2)(c) (Reissue 1995), the hearsay exception for statements against penal interest, or

§ 27-804(2)(e), the residual hearsay exception. Section 27-804(2) provides:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

At trial, the jury was allowed to hear Barnett's confession in its entirety, over Sheets' Confrontation Clause and hearsay objections. Other evidence was adduced at trial concerning the nature of the friendship between Sheets and Barnett at the time the confession was made. Some evidence indicated that the two were as close as ever. Other evidence indicated that the relationship had become strained. Evidence was also provided about the sexual encounter between Sheets and Barnett's girl friend and Barnett's later recantations in which he stated that neither he nor Sheets were involved in the crime and that he had made up the story to impress people at a party.

Sheets was convicted of first degree murder and use of a knife to commit a felony. On June 27, 1997, a hearing

was conducted before a three-judge sentencing panel to determine whether Sheets would be sentenced to life imprisonment or death. After consideration of the aggravating and mitigating circumstances set forth in Neb.Rev.Stat. § 29-2523 (Reissue 1995) and the nonstatutory mitigating circumstances offered by Sheets, the panel conducted a comparative review pursuant to Neb.Rev.Stat. § 29-2522(3) (Reissue 1995). Two of the three judges ultimately determined that the death penalty should be imposed. The third judge, however, dissented, based upon his finding that the State had not proved beyond a reasonable doubt that the murder was "especially heinous, atrocious, [or] cruel," within the meaning of § 29- 2523(1)(d). That same member of the panel therefore concluded that the proper punishment should be a life sentence, rather than the imposition of a sentence of death. A death sentence was imposed on the charge of murder in the first degree based upon the 2 to 1 vote of the sentencing panel. Sheets' mandatory direct appeal was docketed in this court pursuant to Neb.Rev.Stat. § 29-2525 (Reissue 1995).

ASSIGNMENTS OF ERROR

Rephrased, Sheets assigns that the district court erred in (1) admitting the tapes of Barnett's confession in violation of Neb.Rev.Stat. § 27-802 (Reissue 1995), § 27-804, and Sheets' right to confront witnesses against him, pursuant to Neb. Const. art. I, § 11, and the 6th and 14th Amendments to the U.S. Constitution; (2) admitting a memorandum regarding Sheets' service in the U.S. Navy; and (3) not allowing him to treat Officer Bill Jadlowski as a hostile witness. Sheets assigns that the sentencing panel

erred in its application of aggravating and mitigating circumstances, in the performance of its comparative review, and in the imposition of the death penalty on a vote of 2 to 1.

STANDARD OF REVIEW

Whether statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of law. *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

When determining whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, an appellate court independently reviews whether the government's proffered guarantees of trustworthiness satisfy the demands of the clause. *Lilly, supra; U.S. v. Castelan*, 219 F.3d 690 (7th Cir.2000). Historical facts are reviewed for clear error. *Lilly, supra.*

ANALYSIS

The primary issue in this case is whether the admission into evidence of Barnett's confession, consisting of hearsay statements made to investigating authorities pursuant to a plea agreement, violated Sheets' right to confrontation. Although Sheets also assigned as error the admission into evidence of the hearsay statements under §§ 27-802 and 27-804, he does not argue this in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dixon*, 259 Neb.

976, 614 N.W.2d 288 (2000); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Accordingly, we do not address whether the district court erred in admitting the confession into evidence under §§ 27-802 and 27-804 and only address the issue of whether Sheets' confrontation rights were violated.

The Confrontation Clause, U.S. Const. amend. VI, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Accord Neb. Const. art. I, § 11.

> T]he Clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Ohio v. Roberts, 448 U.S. 56, 63-64, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). "The Confrontation Clause reflects 'the ancient faith of the common law, incorporated by the founders in the Bill of Rights, that live confrontation and cross-examination of witnesses in the courtroom is the key to finding truth in a criminal trial.' " *U.S. v. Flores*, 985 F.2d 770, 780 (5th Cir.1993). Thus, the U.S. Supreme Court has stated that the Confrontation Clause forces all witnesses " 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth." ' " *Lilly*, 527 U.S. at 124, 119 S.Ct. 1887, quoting *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). *See*, also, *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33

(1993). "The Confrontation Clause should be abrogated only when the evidence is sufficiently reliable and trustworthy that it obviates the need to explore the state of mind of the declarant." *Hughes*, 244 Neb. at 816, 510 N.W.2d at 38, citing *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), and *Roberts, supra.*

A confession of an accomplice that incriminates a criminal defendant is deemed to be inherently unreliable. *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); *Hughes, supra.* Thus, over the years, the U.S. Supreme Court has " 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.' " *Lilly*, 527 U.S. at 131, 119 S.Ct. 1887, quoting *Lee, supra. See*, also, *Hughes, supra* (statements made while in police custody and in which another party is implicated are highly suspect and presumptively unreliable). The burden is on the State to overcome this strong presumption of unreliability. *See Hughes, supra.*

In *Roberts, supra*, the U.S. Supreme Court determined that when a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability. Reliability can be inferred, without more, in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, absent a showing by the State of particularized guarantees of trustworthiness. *Id.*; *Hughes, supra.* Thus, the *Roberts* analysis requires the application of a two-part test: (1) a determination of whether the statements fall within a firmly rooted hearsay exception and (2) if they do not, whether they have

particularized guarantees of trustworthiness. *Hughes, supra.* Accordingly, we next consider whether Barnett's confession was admissible under either part of the *Roberts* test.

FIRMLY ROOTED ANALYSIS

The first question is whether an alleged accomplice's custodial statements that inculpate a criminal defendant fall under a firmly rooted hearsay exception. Hearsay that falls within a firmly rooted hearsay exception is presumptively reliable and trustworthy; therefore, inferring reliability of such statements will not violate a defendant's confrontation rights. *Hughes, supra,* citing *Roberts, supra,* and *Flores, supra.* In *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Court determined that a residual exception identical to § 27-804(2)(e) was not a firmly rooted exception for Confrontation Clause purposes. Accordingly, we focus only on whether statements against penal interest admitted pursuant to § 27-804(2)(c) fall under a firmly rooted exception.

We note that § 27-804(2)(c) uses the term "statement" in a narrow sense to refer to a specific declaration or remark incriminating the speaker and not more broadly to refer to the entire narrative portion of the speaker's confession. *See, Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994); *U.S. v. Mendoza,* 85 F.3d 1347 (8th Cir.1996). In this case, however, the entire confession, consisting of multiple statements, was introduced into evidence. The record is silent on whether the district court considered the separate admissibility of each of the statements contained in Barnett's confession,

and the State did not ask the district court to parse Barnett's individual statements for Confrontation Clause analysis. Compare *U.S. v. Castelan*, 219 F.3d 690 (7th Cir.2000).

During the time this appeal was pending, the U.S. Supreme Court decided *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). In *Lilly*, an accomplice of the defendant made statements to the police after he was taken into custody that inculpated the defendant in the crime. At trial, the accomplice invoked his Fifth Amendment privilege against self-incrimination. The trial court then admitted the accomplice's statements to the police as statements against interest. All nine justices of the Court agreed that the admission into evidence of the accomplice's statements violated the defendant's right to confrontation. A plurality of the Court concluded that a confession by an accomplice which incriminates a criminal defendant does not fall under a firmly rooted hearsay exception. *Id.*

In determining that the accomplice's statements in *Lilly* did not fall under a firmly rooted exception, the plurality defined a hearsay exception as firmly rooted "if, in light of 'longstanding judicial and legislative experience,' . . . it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the "substance of the constitutional protection." ' " 527 U.S. at 126, 119 S.Ct. 1887, quoting *Wright, supra*, and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

> This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over

> time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial.

Lilly, 527 U.S. at 126, 119 S.Ct. 1887. The plurality noted the Court's prior determination that "due to the sweeping scope of the label, the simple categorization of a statement as a ' " 'declaration against penal interest' " . . . defines too large a class for meaningful Confrontation Clause analysis.' " *Lilly*, 527 U.S. at 127, 119 S.Ct. 1887, quoting *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). *See*, also, *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993). The plurality determined that the practice of admitting statements of an accomplice that incriminate a criminal defendant are of quite recent vintage. Most importantly, such statements are deemed to be inherently unreliable. Following an analysis of previous decisions affecting the issue, the plurality concluded that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly*, 527 U.S. at 134, 119 S.Ct. 1887.

Three concurring justices in *Lilly* reserved the possibility that "a genuinely self-inculpatory statement that also inculpates a codefendant" might nevertheless satisfy a firmly rooted hearsay exception. 527 U.S. at 146, 119 S.Ct. 1887 (Rehnquist, C.J., concurring). However, the concurring justices distinguished between such a statement and statements given as "part of a custodial confession of the sort that this Court has viewed with 'special suspicion.' " *Id.* Accord *U.S. v. Gomez*, 191 F.3d 1214 (10th

Cir.1999). *See*, generally, *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Thus, some courts, prior to *Lilly*, have determined that statements made under circumstances not present in this case, such as statements to people unconnected with law enforcement, were genuinely self-inculpatory and, thus, fell under a firmly rooted hearsay exception. *See*, e.g., *Richardson v. Bowersox*, 188 F.3d 973 (8th Cir.1999), cert. denied ___ U.S. ___, 120 S.Ct. 1971, 146 L.Ed.2d 801 (2000); *U.S. v. York*, 933 F.2d 1343 (7th Cir.1991), overruled on other grounds, *Wilson v. Williams*, 182 F.3d 562 (7th Cir.1999); *U.S. v. Seeley*, 892 F.2d 1 (1st Cir.1989). *See*, also, *Neuman v. Rivers*, 125 F.3d 315 (6th Cir.1997) (statement did not implicate defendant at all).

Other courts have specifically addressed the difference between statements made outside of police custody and statements made while in custody, noting that the latter is presumed to be unreliable. *See*, e.g., *U.S. v. Moses*, 148 F.3d 277 (3d Cir.1998), cert. denied 525 U.S. 1148, 119 S.Ct. 1047, 143 L.Ed.2d 53 (1999); *U.S. v. Barone*, 114 F.3d 1284 (1st Cir.1997); *U.S. v. Costa*, 31 F.3d 1073 (11th Cir.1994); *U.S. v. Matthews*, 20 F.3d 538 (2d Cir.1994); *Olson v. Green*, 668 F.2d 421 (8th Cir.1982); *Barrow v. State*, 749 A.2d 1230 (Del.1999); *Smith v. State*, 746 So.2d 1162 (Fla.App.1999); *State v. Nieto*, 186 Ariz. 449, 924 P.2d 453 (Ariz.App.1996); *State v. Kimble*, 688 So.2d 552 (La.App.1996).

Courts that have considered the issue after *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), have overwhelmingly found that confessions of an accomplice that inculpate a criminal defendant are not within a firmly rooted hearsay exception, especially when

such statements are made to law enforcement authorities. *See*, e.g., *U.S. v. Robbins*, 197 F.3d 829 (7th Cir.1999); *U.S. v. Gomez, supra*; *U.S. v. Lopez-Caceres*, 89 F.Supp.2d 168 (D.Puerto Rico 1999); *U.S. v. Gibson*, 84 F.Supp.2d 784 (S.D.W.Va.2000); *U.S. v. Valenzuela*, 53 F.Supp.2d 992 (N.D.Ill.1999); *State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52 (2000), reconsideration denied 88 Ohio St.3d 1428, 723 N.E.2d 1115 (2000); *Ins. Co.*, 610 N.W.2d 538 (Iowa App.2000) *Shinn v. Iowa Mut.*; *Rankins v. Com.*, 31 Va.App. 352, 523 S.E.2d 524 (2000); *Barrow, supra*; *Smith, supra*; *People v. Quick*, 308 Ill.App.3d 474, 720 N.E.2d 1137, 242 Ill.Dec. 182 (1999), appeal denied 188 Ill.2d 578, 729 N.E.2d 502, 246 Ill.Dec. 129 (2000). *See*, generally, *U.S. v. Egan*, 53 M.J. 570 (Army Ct.Crim.App.2000); *Com. v. Young*, 561 Pa. 34, 748 A.2d 166 (1999); *State v. Tangie*, No. (Cite as: 260 Neb. 325, *340, 618 N.W.2d 117, **129) 98-0896, 2000 WL 142096 (Iowa App. Feb.9, 2000), vacated on other grounds 616 N.W.2d 564 (Iowa 2000); *State v. Dinkins*, 339 S.C. 597, 529 S.E.2d 557 (S.C.App.2000). *See*, also, *Richardson v. Bowersox, supra* (recognizing that use of statements of codefendants that inculpate different criminal defendant would be prohibited, but allowing statements that only inculpated declarant). *See*, generally, *Dearing v. Com.*, 259 Va. 117, 524 S.E.2d 121 (2000).

Applying an analysis similar to that of the plurality in *Lilly*, we have previously held that statements against interest pursuant to § 27- 804(2)(c) do not fall under a firmly rooted hearsay exception. In particular, we stated:

> [S]tatements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable. . . . Generally, the

> circumstances surrounding the making of these statements necessitate an exploration of the declarant's state of mind. It cannot be said, without a specific showing of trustworthiness, that such a statement should be admitted without an opportunity for cross- examination.

State v. Hughes, 244 Neb. 810, 817, 510 N.W.2d 33, 38 (1993), citing *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and *Olson v. Green*, 668 F.2d 421 (8th Cir.1982). We noted that statements made in response to police interrogation generally do not have inherent guarantees of reliability and trustworthiness. "A statement made by a person subject to criminal liability, in which the declarant incriminates a third party, may be the result of the declarant's motivation and opportunity to curry favor with the authorities." *Hughes*, 244 Neb. at 818, 510 N.W.2d at 38-39. Thus, we held in *Hughes* that "reliability of statements that fall within the hearsay exception for statements against penal interests may not be inferred, and the proponent of such evidence must carry the burden of demonstrating the trustworthiness and reliability of the statement." 244 Neb. at 818, 510 N.W.2d at 39, citing *U.S. v. Flores*, 985 F.2d 770 (5th Cir.1993).

We conclude that to the extent § 27-804(2)(c) encompasses inherently unreliable statements, it is not a firmly rooted hearsay exception for purposes of Confrontation Clause analysis. In this case, the statements in Barnett's confession inculpating Sheets were made while Barnett was in police custody. Such statements are presumptively unreliable. Thus, the statements did not fall within a firmly rooted hearsay exception. *See, Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *U.S. v.*

Gomez, 191 F.3d 1214 (10th Cir.1999); *Flores*, *supra*; *Hughes*, *supra*. Accordingly, we next address whether the State has shown that the statements had particularized guarantees of trustworthiness under the second portion of the *Roberts* test.

GUARANTEES OF TRUSTWORTHINESS

Sheets contends that the State did not meet its burden to prove that Barnett's statements had particularized guarantees of trustworthiness. Sheets points to the fact that Barnett's statements were given while he was in custody and pursuant to a plea agreement. The confession inculpated Sheets in the crime and portrayed Sheets as the person who physically raped, beat, and killed Bush. Sheets further notes that Barnett made previous inconsistent statements about the crime and that Barnett later recanted his own and Sheets' involvement. The State, however, argues that statements in Barnett's confession were not made in response to leading questions and that the police did not provide Barnett with details of the crime. The State contends that because Barnett was counseled by an attorney, incriminated himself substantially in the commission of the crime, and promised to be truthful, the presumption of unreliability has been rebutted.

We independently review the State's proffered guarantees of trustworthiness. The Court stated in *Lilly*:

> Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees

> of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact- intensive, mixed questions of constitutional law, that "[i]ndependent review is. . . necessary . . . to maintain control of, and to clarify, the legal principles" governing the factual circumstances. . . .

Lilly, 527 U.S. at 136, 119 S.Ct. 1887, quoting *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The presence or absence of historical facts are reviewed for clear error. *Id.*

To determine whether a statement against penal interests meets the second prong of the *Roberts* test, a court must examine the totality of the circumstances surrounding the making of the statement to determine whether the statement has particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to its reliability. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993), citing *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). *See*, also, *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991). Thus, hearsay admitted under the Confrontation Clause must be so trustworthy that cross-examination of the declarant would be of marginal utility. *Wright, supra*. *See Hughes, supra*. There is no mechanical test for determining whether a statement bears particularized guarantees of trustworthiness under the clause. *Wright, supra*. However, we stated in *Hughes* that particularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had motive to mitigate his or her own criminal liability, and whether the

declarant made the statement in response to leading questions. *See*, also, *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

When a court examines the totality of the circumstances, it is important to note that evidence tending to corroborate the content of a hearsay statement cannot support a finding that the statement bears particularized guarantees of trustworthiness. *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *U.S. v. Flores*, 985 F.2d 770 (5th Cir.1993); *Hughes, supra*, citing *Wright, supra*. If the circumstances indicate a likelihood that the declarant had a motive to lie, there is a greater need to cross-examine the declarant, and corroborating evidence is not a substitute for that need to explore the declarant's motivation. *Id*. The analysis of whether the second prong of the *Roberts* test has been met is the same when reviewing statements admitted under either § 27-804(2)(c) or (2)(e). *See, Wright, supra; Hughes, supra*.

In this case, statements in Barnett's confession are of the kind that historically have caused the greatest concern. The statements were made while Barnett was in custody, and the confession acted to inculpate Sheets in the crime. In statements made to nonundercover, law-enforcement personnel after the commission of the offense, "there always exists the strong possibility that the declarant has the 'desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.' " *Flores*, 985 F.2d at 780.

In *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), the Court stated:

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice – that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

See, also, *Flores, supra.* The Seventh Circuit Court of Appeals recently stated:

> Since *Lilly* was decided, no circuit has yet determined if – and under what circumstances – an accomplice's custodial confession implicating a defendant can ever be deemed to possess sufficient inherent indicia of trustworthiness to satisfy the Confrontation Clause. Thus, the full scope of *Lilly* remains undefined. At least one treatise has explained that in *Lilly* "all nine justices of the Supreme Court indicated, more or less explicitly, that the admission of custodial statements to law enforcement personnel against penal interest . . . whether or not constituting a confession, that incriminate another person violates the confrontation clause when admitted against such other person in a criminal case."

U.S. v. Castelan, 219 F.3d 690, 695 (7th Cir.2000), quoting 31 Michael H. Graham, Federal Practice and Procedure § 6742 (2d ed.2000).

The suggestion that Barnett had a motive to curry favor with authorities is especially strong in this case. Of most importance, Barnett made his statements pursuant

to a plea bargain, thereby avoiding a charge of first degree murder. Although the maximum sentence Barnett might have received for either first or second degree murder was a life sentence because he was 17 years of age at the time the crime was committed, the minimum would be dramatically different. Under the relevant statutes, Barnett would have been subject to a 10-year minimum sentence of imprisonment for second degree murder. *See* Neb.Rev.Stat. §§ 28-304 and 28-105 (Reissue 1995). Further, as part of the agreement, the State agreed not to bring a weapons charge against Barnett. The sentence for such a charge would have been a maximum of 20 years' imprisonment, a $25,000 fine, or both, and the minimum would have been 1 year's imprisonment. *See* Neb.Rev.Stat. §§ 28-1205 and 28-105 (Reissue 1995). The sentence would have run consecutively to the murder sentence. *See* § 28-1205. Barnett's attorney testified that although the matter was not really discussed, one could hope to serve the minimum amount of time when time off for good behavior was considered, which in this case would be 5 years' imprisonment.

The record shows that Barnett stated to investigating officers his fear that he would be harmed in jail because he was implicated in the killing of a black woman due to racial animus. Thus, the plea bargain specifically included promises on the part of the State to provide for Barnett's protection. Following his confession, Barnett was housed in the Washington County jail instead of in the Douglas County jail. This indicates a strong motive for Barnett to seek to curry favor with the authorities. *See U.S. v. Flores*, 985 F.2d 770 (5th Cir.1993). Additionally, Barnett expressed concerns about the length of time he

might spend in jail under the plea bargain, asking others in the Washington County jail about what sentence they thought he might receive for second degree murder and how much time he might actually serve.

The absence of any specific agreement regarding the maximum sentence does not lessen the possibility that Barnett was seeking favorable treatment. *See*, generally, *Garrison v. State*, 726 So.2d 1144 (Miss.1998) (although declarant was never offered, nor did he receive, favorable treatment, it could be perceived that in declarant's mind, guilty plea might engender favorable treatment when declarant held out hope for alternative sentencing as minor). As the 10th Circuit Court of Appeals has stated:

> [T]he presence of a plea agreement, even after the defendant has been convicted, also would not serve as an indicia of trustworthiness because the declarant would have a strong desire to curry favor with the government and divert attention to another in the "hopes that the government will make favorable recommendations to the sentencing judge." . . . Even after sentencing, these motives may exist because "the government still possesses influence regarding the security level and location of the prison where the [declarant] is to be incarcerated."

Flores, 985 F.2d at 782 n. 25, quoting *U.S. v. Gomez-Lemos*, 939 F.2d 326 (6th Cir.1991). *See*, generally, *U.S. v. Hazelett*, 32 F.3d 1313 (8th Cir.1994). Thus, courts generally find that custodial statements made pursuant to an express or implied offer of leniency do not have the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause. *See*, e.g., *U.S. v. Castelan*, 219 F.3d

690 (7th Cir.2000); *U.S. v. Gomez*, 191 F.3d 1214 (10th Cir.1999); *State v. Lopez*, 128 N.M. 410, 993 P.2d 727 (1999); *State v. Nieto*, 186 Ariz. 449, 924 P.2d 453 (Ariz.App.1996); *Wilson v. State*, 334 Md. 313, 639 A.2d 125 (1994). *See*, generally, *Flores, supra; Garrison, supra; Brown v. State*, 953 P.2d 1170 (Wyo.1998).

In essence, Barnett implicated Sheets as the mastermind and primary actor and himself as subjectively, if not actually, a less culpable accomplice. Meanwhile, in exchange for Barnett's testimony against Sheets, he arranged a plea bargain in which he received a reduced charge, an agreement not to file a weapons charge, and a commitment for his safety while incarcerated. Barnett then made his statements pursuant to that agreement. A circumstance in which a declarant admits his or her presence and participation in a crime, but indicates that another was the "mastermind" or primary actor, is one of the more common fact patterns in which courts hold that a declarant's statements inculpating the defendant may not be admitted at trial. *See*, e.g., *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct. 2431, 129 (Cite as: 260 Neb. 325, *346, 618 N.W.2d 117, **133) L.Ed.2d 476 (1994) (Ginsberg, J., concurring); *Hazelett, supra; U.S. v. Magana-Olvera*, 917 F.2d 401 (9th Cir.1990); *U.S. v. Valenzuela*, 53 F.Supp.2d 992 (N.D.Ill.1999). *See*, also, *State v. Kimble*, 688 So.2d 552 (La.App.1996) (finding that statement was not truly self-inculpatory under these circumstances); *People v. Farrell*, 10 P.3d 672 (Colo.App. 2000) (declarant pointed to defendant as leader).

Also of concern is the possible motive Barnett may have had to seek revenge against Sheets because of the

sexual encounter that occurred between Sheets and Barnett's girl friend. The record could support two different conclusions: (1) that Sheets and Barnett were best friends and were very close at the time Barnett made his statements to the police or (2) that the friendship was no longer very close and had become strained. With the burden placed on the State to prove guarantees of trustworthiness, the possibility, supported by the record, that Sheets and Barnett had a falling out leads to the conclusion that Barnett had a potential motive to shift or spread blame to Sheets and to focus on Sheets in attempting to curry favor with authorities. Given this potential motive to shift or spread blame to Sheets, cross- examination of Barnett on this issue would certainly have been of more than marginal utility. *See Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The State contends that Barnett's statements have particularized guarantees of trustworthiness for several reasons. First, the State contends that the plea bargain is of little significance and offers as a guarantee of trustworthiness the fact that Barnett, in his confession, did not exonerate himself or mitigate his criminal liability. However, Barnett's confession inculpated Sheets as the person who physically carried out the crimes. According to Barnett, it was Sheets who removed Bush's clothes, Sheets who raped her, Sheets who beat her, and Sheets who stabbed and killed her.

The fact that Barnett made a broadly self-inculpatory confession does not make more reliable the confession's nonself-inculpatory parts. *U.S. v. Gomez*, 191 F.3d 1214 (10th Cir.1999), citing *Williamson, supra. See, Lilly, supra; Farrell, supra. See*, also, *U.S. v. Flores*, 985 F.2d 770 (5th

Cir.1993). "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson*, 512 U.S. at 599-600, 114 S.Ct. 2431. Further,

> it is no longer clear whether considering the degree to which a statement is against penal interest is even permissible: this factor "merely restates the fact that portions of his statements were technically against penal interest." . . . "[S]uch statements [against penal interest] are suspect insofar as they inculpate other persons. '[T]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non- self-inculpatory parts.' "

Gomez, 191 F.3d at 1223, quoting *Williamson, supra*. Accord, *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Farrell, supra*. *See*, also, *Flores, supra* (noting that declarant must make incriminating statement in order to fit within exception in first place). In addition, a clear distinction cannot be drawn between cases in which a declarant shifts the entire blame to the defendant and those in which the declarant spreads the blame both to himself or herself and to the defendant. Thus, it has been held that a statement does not have sufficient indicia of reliability even when the declarant placed a large portion of the blame on himself or herself but also inculpated others. *Crespin v. State*, 144 F.3d 641 (10th Cir.1998), cert. denied 525 U.S. 950, 119 S.Ct. 378, 142 L.Ed.2d 313.

The State next points to the fact that Barnett was represented by counsel as an indication of trustworthiness. The fact that Barnett was represented by counsel has little bearing on whether the statement was free from

any desire, motive, or impulse Barnett may have had either to mitigate the appearance of his own involvement or to overstate Sheets' involvement. *See Lilly, supra,* and *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (making this statement in regard to voluntary nature of statement). In statements made to nonundercover law enforcement personnel after the commission of the offense, "there always exists the strong possibility that the declarant has the 'desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.' " *Flores,* 985 F.2d at 780. The presence of an attorney does not provide an indication that such motives are absent. Rather, the fact that Barnett made the taped statement after using counsel to obtain a plea agreement equally indicates that the statement was made to obtain leniency. Further, after he retained and consulted at length with his attorney, Barnett made two different and conflicting statements to authorities. The presence of an attorney did not prevent Barnett from providing authorities with inconsistent and, thus, less trustworthy statements. Accordingly, we find the presence of an attorney under the circumstances of this case to be irrelevant as a factor showing that Barnett's statements had particularized guarantees of trustworthiness.

The State also points to the fact that Barnett's statements were not made as the result of police coercion and that Barnett agreed to be truthful when giving his statements. The U.S. Supreme Court has said that whether a statement is voluntary for Fifth Amendment purposes does not bear on the question of whether the confession was also free from any desire, motive, or impulse of the declarant to mitigate his or her own culpability by

spreading or shifting blame to the defendant. *Lee, supra. See,* also, *U.S. v. Valenzuela,* 53 F.Supp.2d 992 (N.D.Ill.1999). Thus, a lack of coercion is irrelevant.

That Barnett promised to be truthful as part of the plea agreement is also of little help. Before making the agreement, Barnett was already facing a charge of first degree murder. He gained a reduced charge by entering into the plea agreement and agreeing to make statements to the police and to testify against Sheets. Had he not carried through with the terms of the agreement, Barnett would have been no worse off than he was originally when he was facing a charge of first degree murder. Thus, Barnett had nothing to lose and everything to gain by making a confession in which he inculpated Sheets. *See, U.S. v. Mendoza,* 85 F.3d 1347 (8th Cir.1996); *U.S. v. Hazelett,* 32 F.3d 1313, 1318 (8th Cir.1994) (stating that for all practical purposes, declarant's conviction was assured and that "she had nothing to lose by confessing, and she certainly had nothing to lose by implicating another person, particularly someone more culpable"); *U.S. v. Costa,* 31 F.3d 1073 (11th Cir.1994). As the U.S. Supreme Court has stated, a reality of the criminal process is that "once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Lee,* 476 U.S. at 544-45, 106 S.Ct. 2056. Even statements made under oath have at times been considered not to exhibit particularized guarantees of trustworthiness. *See,* e.g., *U.S. v. Flores,* 985 F.2d 770 (5th Cir.1993); *U.S. v. Lopez-Caceres,* 89 F.Supp.2d 168 (D.Puerto Rico 1999).

The State points out that Barnett's statements were not made in response to leading questions. We stated in

State v. Hughes, 244 Neb. 810, 510 N.W.2d 33 (1993), that whether a statement was made in response to leading questions was one of the factors particularly relevant to the determination of trustworthiness. The State also points to the level of detail provided by Barnett and argues that the police did not provide him with information or details about the crime. Although we agree that these factors do provide some basis for determining trustworthiness, we conclude that such factors cannot overcome the strong presumption of unreliability present in a case such as this where Barnett made the statements while in police custody and where a motive to curry favor with the authorities existed. As the Fifth Circuit Court of Appeals stated in *Flores*, "While the presence of [various] factors . . . doubtless renders a given confession more reliable than it would otherwise be, we are not persuaded that it substantially eliminates any reasonable possibility that the third party inculpatory portions of a confession to law enforcement personnel are unreliable." 985 F.2d at 782. *See United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir.1981). *See*, generally, *People v. Quick*, 308 Ill.App.3d 474, 720 N.E.2d 1137, 242 Ill.Dec. 182 (1999) (listing factors similar to those offered by State as not sufficient to overcome presumption of unreliability). The court in *Flores* further stated:

> The Supreme Court has never allowed the admission against a defendant of a codefendant's hearsay inculpatory statements to law enforcement authorities, although it has suggested that theoretically such hearsay could be admitted in appropriate circumstances. . . . But that suggestion should not drive us to allow a codefendant's confession to law enforcement

> authorities to be admitted against the defendant merely because the district court is able to fairly recite a litany of factors and conclude that the particular confession has "sufficient indicia of reliability."
> 985 F.2d at 782.

In order to satisfy principles of confrontation, there must be enough indication of reliability and trustworthiness that cross-examination would be of marginal utility. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). *See Hughes, supra.* " 'The [particularized guarantees of] "trustworthiness" test credits the axiom that a rigid application of the [Confrontation] Clause's standard for admissibility might in the exceptional case exclude a statement of an unavailable witness that is incontestably probative, competent, and reliable, yet nonetheless outside of any firmly rooted exception.' " *U.S. v. Castelan*, 219 F.3d 690, 695 (7th Cir.2000), quoting *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). This, however, is not the exceptional case where the statements are incontestably probative, competent, and reliable. In this case, the government was involved in the production of the statements, the statements were not subjected to adversarial testing, and the statements were made under circumstances in which Barnett had a motive to exaggerate or fabricate Sheets' role. In this case, the presumption of unreliability has not been rebutted. *See*, e.g., *Vincent v. Seabold*, 226 F.3d 681 (6th Cir. 2000); *U.S. v. Flores*, 985 F.2d 770 (5th Cir.1993); *United States v. Sarmiento-Perez, supra; U.S. v. Valenzuela*, 53 F.Supp.2d 992 (N.D.Ill.1999); *U.S. v. Egan*, 53 M.J. 570 (Army Ct.Crim.App.2000); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993); *People v. Quick, supra; People v. Farrell*,

10 P.3d 672 (Colo.App. 2000). Although Sheets also raised the fact that Barnett recanted his confession on several occasions, we do not find it necessary to determine whether recantation is a circumstance "exist[ing] at the time the statement was made" and thus a factor to be considered when addressing whether statements have particularized guarantees of trustworthiness. *See Idaho v. Wright, supra.*

The circumstances surrounding the making of the statements in this case suggest three possibilities: (1) It is possible that the murder was committed as described; (2) it is possible that Barnett reversed the roles between Sheets and himself; and (3) it is possible that Sheets had no involvement in the murder whatsoever. Given the circumstances surrounding the making of the statements and Barnett's subsequent death, we cannot say that cross-examination would be of marginal utility.

The Confrontation Clause is not a mere technicality. It is a right of citizens which provides a protection that "responds to ' "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' " ' " *Flores,* 985 F.2d at 781. Any motive Barnett would have had to lie when incriminating Sheets could be truly explored only by cross-examination. Sheets was denied that right. We conclude that Barnett's statements lack inherent particularized guarantees of trustworthiness. Accordingly, we determine that the district court erred in admitting Barnett's taped confession in its entirety into evidence.

HARMLESS ERROR

The admission into evidence of statements in violation of the Confrontation Clause is subject to a harmless error analysis. *See Hughes, supra.* An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *Id.* An error is harmless when the improper admission did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *Id.* In this case, Barnett's taped statements were the primary evidence against Sheets. Accordingly, the admission into evidence of those statements was not harmless beyond a reasonable doubt.

Having found error, we now determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. In *Lockhart v. Nelson,* 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *See State v. Anderson,* 258 Neb. 627, 605 N.W.2d 124 (2000). Thus, although we have concluded that Barnett's confession was erroneously admitted, we include such evidence in our analysis of sufficiency of the evidence. *See Lockhart, supra.* We conclude that Barnett's confession was sufficient to sustain Sheets' convictions. Because the erroneously admitted confession was not harmless, we reverse, and remand for a new trial.

CONCLUSION

We determine that to the extent § 27-804(2)(c) encompasses inherently unreliable statements, it is not a firmly rooted hearsay exception for purposes of Confrontation Clause analysis. We further determine that the State did not meet its burden to prove that statements in Barnett's taped confession had the particularized guarantees of trustworthiness necessary to overcome Sheets' right to confrontation. Finally, we conclude that the admission into evidence of the statements was not harmless. Accordingly, we reverse, and remand for a new trial. Because we reverse on the basis that Sheets' confrontation rights were violated, we do not reach his other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., concurring.

I join in the majority opinion, but I write separately because I would also consider the fact that Barnett recanted his statement.

We must evaluate whether Barnett's statement contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little if anything to its reliability. *See Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). In *Wright*, the Court declined to endorse a mechanical test determining particularized guarantees of trustworthiness but did state that evidence corroborating the truth of a hearsay statement cannot be used to support a finding that the statement bears the requisite particularized guarantees of trustworthiness. Thus, the proponent of the statement's

reliability is not permitted to bootstrap the statement's admissibility by use of corroborating evidence. "[T]he presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless. . . . " *Wright*, 497 U.S. at 823, 110 S.Ct. 3139.

While it is clear that corroborating evidence cannot be used to enhance the reliability of a statement, it is not clear whether such a rule prevents consideration of a recantation of the statement by the declarant. In my opinion, courts can and should consider whether the declarant has recanted a statement. The right to cross-examine is abrogated only when adversarial testing would be expected to add little if anything to its reliability. What would be of greater significance than the fact that the declarant had recanted the statement? The Confrontation Clause should be abrogated only when the evidence is so sufficiently reliable and trustworthy that it obviates the need to explore the state of mind of the declarant. *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

Barnett recanted the statement at least four times. He told his mother that he was not present when Bush was murdered, that he would tell the truth at Sheets' preliminary hearing, that he and Sheets were not involved in the murder, and that he could not "send anybody else down for some drunken, stupid thing" he had started and could not get out of. Barnett was referring to an episode where he was drinking with Jason LaNoue and talked about the killing.

Barnett's girl friend spoke with Barnett while he was in jail. She testified that Barnett said he and Sheets had not killed Bush. When she asked Barnett why he had not told the police that it was all a lie, he stated that he had tried to tell the police "it was just a bunch of drunken bull, and they wouldn't believe him." He told her that when he got to trial, "he was going to tell the truth that they didn't do it."

A cellmate of Barnett's in the Washington County jail testified that Barnett told him that neither Barnett nor Sheets had any involvement in the murder of Bush. The cellmate stated that Barnett had made up the story to impress some people at a party.

Sheets' wife testified that she had received a telephone call from Barnett while he was in the Washington County jail and that Barnett told her he had just been "bullshitting" and nothing he had said was true.

In my opinion, Barnett's recantation is of enormous significance in our evaluation of the statement's trustworthiness. The fact that Barnett made prior inconsistent statements and subsequently recanted his confession goes to the very heart of Sheets' right to cross-examine his accuser.

This issue was addressed in *Ryan v. State*, 899 P.2d 1371 (Alaska App.1995). There, the victim of a sexual assault committed suicide a few hours before she was scheduled to testify before a grand jury. The state secured indictments against the two defendants, John Ryan and Jerome Trigg, through testimony of a police officer who had interviewed the victim.

During the first interview by police, the victim denied that she had been socializing with the two men who had assaulted her. She claimed that the men had stolen her vehicle and driven away and that her uncle had driven her to a cabin and left. She then entered the cabin, and the men, who appeared to be drunk, ordered her to take off her clothes and assaulted her.

The next day, in a second statement, the victim altered her previous account of how she had arrived at the cabin and how the assault had occurred. She admitted socializing with Ryan and Trigg and driving to the cabin, where the three of them continued to drink. At some point, things got out of hand, and she was assaulted by both men.

Before trial, Ryan and Trigg challenged the admissibility of the victim's statements, but the trial court found that the statements to police were admissible under Alaska Evid. R. 804(b)(5), one of Alaska's two residual hearsay exceptions. The court concluded that the residual hearsay exceptions were not firmly rooted exceptions and, therefore, examined the statements for particularized guarantees of trustworthiness.

The appellate court reversed, stating that its task was to determine whether the statements were so inherently trustworthy, so free from possible doubt, that cross-examination of the victim would yield negligible benefit to Ryan and Trigg as they stood trial for sexual assault. The state claimed that *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), prohibited consideration of the fact that the victim had made inconsistent statements

in evaluating the trustworthiness of the hearsay statement. The court concluded:

> The State's argument, while perhaps ingenious, is inconsistent with both the law and common sense. In judging the reliability of an absent person's assertion, reasonable people would want to know, and would take into account, the fact that the same person had made an inconsistent assertion on another occasion. The case law recognizes and employs this rule of common sense.
> *Ryan*, 899 P.2d at 1377 n. 3.

I conclude that Barnett's recantation is a circumstance that should be considered.

MILLER-LERMAN, J., concurring.

INTRODUCTION

I concur in the result reached by the majority; however, I do so based on different reasoning. With respect to the majority's conclusion that the Barnett custodial statement of September 28, 1996, should be excluded because it does not fall within a firmly rooted hearsay exception, I agree. With respect to the majority's analysis that the statement should be excluded as inadmissable hearsay because it lacks particularized guarantees of trustworthiness under the second prong of the test as articulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), I conclude that the Confrontation Clause, rather than the general rule against the admission of hearsay, requires the exclusion of the custodial statement as a constitutional, rather than an evidential, matter.

Under the Sixth Amendment to the U.S. Constitution, a defendant in a criminal prosecution has the right "to be confronted with the witnesses against him." *See*, also, Neb. Const. art. I, § 11. The U.S. Supreme Court has directed that for "hearsay evidence [to be] admitted under the Confrontation Clause [it must] be so trustworthy that cross-examination of the declarant would be of marginal utility," *Idaho v. Wright*, 497 U.S. 805, 823, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), and has further stated that the prohibitions of the Confrontation Clause do not "equate . . . with the general rule prohibiting the admission of hearsay statements," 497 U.S. at 814, 110 S.Ct. 3139. In this case, I conclude that the cross-examination of Barnett would be of greater than marginal utility and that adversarial testing would add to an assessment of the custodial statement's reliability, and, therefore, the admission of the Barnett statement, which is hearsay, violated the Confrontation Clause. Such admission was not harmless in this case, particularly in light of the fact that Barnett's statement tied the defendant to the crimes. I, therefore, concur in the result reached by the majority that the admission of the custodial statement was reversible error and that the cause should be remanded for a new trial.

ANALYSIS

Development of *Roberts* in *Wright* and *Lilly*.

As stated by the majority, the U.S. Supreme Court initially developed a two-part test for the admissibility of statements of unavailable witnesses in *Roberts, supra*. The Court held that when a hearsay declarant is not present

for cross-examination at trial and it is determined that the declarant is unavailable, the Confrontation Clause allows admission of the declarant's statement only if the statement is shown to bear adequate " 'indicia of reliability.' " *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531. Such reliability must be demonstrated by showing that (1) the statement falls within a "firmly rooted hearsay exception" or (2) if the statement does not fall within a firmly rooted hearsay exception, it contains "particularized guarantees of trustworthiness." *Id.*

The two parts of the *Roberts* test were intended to be functional equivalents. The Court has stated:

> In *Roberts*, we recognized that even if certain hearsay evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." . . . However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' "

(Citations omitted.) *Lee v. Illinois*, 476 U.S. 530, 543, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) (quoting *Roberts, supra*). Evidence possessing "particularized guarantees of trustworthiness" must therefore be at least as reliable as evidence admitted under a firmly rooted hearsay exception. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65

L.Ed.2d 597 (1980). *See*, also, *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Under the *Roberts* test, the reliability of evidence which falls within a firmly rooted hearsay exception "can be inferred without more." *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531. Statements within a firmly rooted hearsay exception are therefore admissible without an additional explicit Confrontation Clause analysis.

The U.S. Supreme Court developed the *Roberts* test in *Wright, supra.* The Court in *Wright* stated that "[b]ecause evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception," evidence admitted under the second part of the *Roberts* test must be "so trustworthy that adversarial testing would add little to its reliability." 497 U.S. at 821, 110 S.Ct. 3139. The Court in *Wright* further stated that "hearsay evidence admitted under the Confrontation Clause [must] be so trustworthy that cross- examination of the declarant would be of marginal utility." 497 U.S. at 823, 110 S.Ct. 3139. *See*, also, *Wright*, 497 U.S. at 820, 110 S.Ct. 3139 ("declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility").

The Court in *Wright* noted that the Confrontation Clause "bars admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." 497 U.S. at 814, 110 S.Ct. 3139. However, the Court also recognized that "statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability."

Wright, 497 U.S. at 821, 110 S.Ct. 3139. Following the development of the *Roberts* test in *Wright*, it is clear that if a statement can be categorized as falling within a firmly rooted hearsay exception, it is admissible under the Confrontation Clause without further examination; if, however, a statement is not within a firmly rooted hearsay exception but does contain "particularized guarantees of trustworthiness," such statement is nevertheless subject to further Confrontation Clause analysis as to whether the statement is so trustworthy that adversarial testing would add little to its reliability, and cross-examination would be of marginal utility.

In *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), a case which involved a custodial statement, the U.S. Supreme Court's plurality opinion states that the Court is adhering to the general framework for Confrontation Clause analysis of hearsay statements set forth in *Roberts*. However, the *Lilly* plurality opinion recites the second part of the *Roberts* test as requiring that to be admissible, the statement must contain " 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." (Emphasis supplied.) *Lilly*, 527 U.S. at 125, 119 S.Ct. 1887. Although the text of *Lilly* refers to *Roberts* as the source of the foregoing statement, *Roberts* says only that the statement must have "particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S.Ct. 2531. The remainder of the test as recited in *Lilly* is a paraphrase of the *Wright* development of the *Roberts* test.

Roberts Test as Developed by *Wright* and *Lilly* as Applied to Custodial Statement.

Synthesizing the cases recited above, I respectfully suggest that the test and method in practice for analyzing the admissibility of a custodial hearsay statement which inculpates a criminal defendant are not entirely clear. I believe that the two-part *Roberts* test has been developed by *Wright* and *Lilly*. Following *Roberts*, *Wright*, and *Lilly*, if a custodial statement falls within a firmly rooted hearsay exception, the statement continues to be admissible without further Confrontation Clause analysis. If, however, the custodial statement does not fall within a firmly rooted hearsay exception, I view the second part of the test, as a practical matter, as now requiring two inquiries: first, an evidential hearsay inquiry as to whether the custodial statement contains particularized guarantees of trustworthiness and, second, a constitutional inquiry driven by the Confrontation Clause as to whether the custodial statement is so trustworthy that adversarial testing would add little to its reliability, and cross- examination would be of marginal utility.

I believe that these two inquiries are separate and distinct. I do not believe that the second inquiry pertaining to adversarial testing and the utility of cross-examination is merely a descriptor of the conclusion reached as a result of the first inquiry pertaining to the examination for particularized guarantees of trustworthiness. I believe a constitutional inquiry is qualitatively different from other inquiries. Thus, I also do not view the constitutional inquiry as just another item of reliability to be evaluated equally along with other garden-variety indicia of reliability in reaching a conclusion as to whether a statement bears particularized guarantees of trustworthiness.

Following *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), and *Lilly, supra*, and notwithstanding the fact that the Court has not tied the inquiries together with the word "and," I respectfully view the two inquiries of the second prong of the developed *Roberts* test as being conjunctive, and if a custodial statement fails either inquiry, its admission is barred. In particular, I would conclude that if, on an objective basis, adversarial testing would add to an assessment of the custodial statement's reliability and cross-examination would be of greater than marginal utility, the custodial statement's admission is barred as a constitutional matter under the Confrontation Clause, regardless of the outcome of the first inquiry under the second prong of the developed *Roberts* test.

Application of Developed *Roberts* Test to Instant Case.

In the instant case, I agree with the majority's conclusion that the statement does not fall within a firmly rooted hearsay exception. Therefore, I am required to analyze the custodial statement under the second prong of the *Roberts* test as developed by *Wright, supra*, and *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). Because, as discussed below, I conclude that adversarial testing would add to an assessment of the custodial statement's reliability and that cross-examination would be of greater than marginal utility, I also conclude that the Confrontation Clause bars admission of the custodial statement, and I need not address the first inquiry under the second prong of the developed *Roberts* test by evaluating at length purported guarantees of trustworthiness.

The evidence in the instant case is such that there are numerous matters for which adversarial testing would be useful for assessing the custodial statement's reliability, and cross-examination would be of more than marginal utility in the jury's assessment of Barnett's credibility. Among the matters which objectively ought to be the subject of cross-examination for Confrontation Clause purposes are (1) the nature of Barnett's plea bargain and consequent exposure at sentencing; (2) Barnett's motives to curry favor with the authorities and to exaggerate the defendant's involvement in the crimes while minimizing his own role; (3) the nature of the relationship between Barnett and the defendant due to their separate sexual relationships with Barnett's girl friend and Barnett's possible motive to seek revenge against the defendant; (4) the nature, motive, and substance of the two statements Barnett gave to the authorities prior to giving the September 28, 1996, statement, which prior statements differed considerably from the statement at issue in this case; and (5) the nature, motive, and substance of several statements Barnett made to various persons recanting his involvement in the crimes after making the statement of September 28.

Each of the above matters would have made cross-examination of Barnett of more than marginal utility, and adversarial testing by cross-examination on these matters would have added significantly to the jury's assessment of Barnett's credibility and the reliability of Barnett's custodial statement in which the defendant is inculpated. The defendant's right of confrontation was particularly implicated in the instant case by the fact that Barnett's custodial statement tied the defendant to the crimes, and

it was, therefore, particularly vital that the defendant have the opportunity to subject such evidence to adversarial testing. Admission of the Barnett statement violated the defendant's right to confrontation, and therefore, the admission of the Barnett custodial statement was reversible error, without regard to an assessment of the factors proferred by the State in its supplemental brief filed on July 27, 1999, as evincing guarantees of trustworthiness, and the cause should be remanded for a new trial.

Relationship Between Hearsay and Confrontation Clause.

In reaching the foregoing conclusion, I am aware that jurists and scholars have expressed their unease with the jurisprudence surrounding the relationship between the rule against hearsay and the Confrontation Clause as it relates to the admissibility of out-of-court statements by unavailable declarants that inculpate the defendant. *See*, e.g., *Lilly, supra* (Breyer, J., concurring); *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part, and concurring in judgment; Scalia, J., joins); Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. (cite as: 260 Neb. 325, *361, 618 N.W.2d 117, **142) 1045 (1998); Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L.Rev. 557 (1992); Joshua C. Dickinson, The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce, 33 Creighton L.Rev. 763 (2000); Richard D. Friedman, Confrontation: The

Search for Basic Principles, 86 Geo. L.J. 1011 (1998); Benjamin E. Rosenberg, The Future of Codefendant Confessions, 30 Seton Hall L.Rev. 516 (2000); The Supreme Court, 1998 Term – Leading Cases: I. Constitutional Law, B. Criminal Law and Procedure, 1. Confrontation Clause – "Firmly Rooted" Hearsay Exceptions, 113 Harv. L.Rev. 233 (1999). Much of the commentary is dedicated to the *Roberts* doctrine and its subsequent development by the Court.

As outlined above, initially under *Roberts*, it appeared that hearsay which fell under a firmly rooted exception and hearsay which was found to bear particularized guarantees of trustworthiness were functional equivalents for purposes of admissibility. However, case law subsequent to *Roberts* subjected the nonfirmly rooted hearsay to explicit Confrontation Clause scrutiny by asking whether cross-examination of the declarant of a custodial statement would be of marginal utility and whether adversarial testing would add little, while the firmly rooted hearsay exception remained admissible and free of explicit Confrontation Clause analysis. Observers have commented on this discordance between once equally admissible statements by which, currently, statements admitted under a firmly rooted hearsay exception are not subject to explicit Confrontation Clause review, whereas custodial statements sought to be admitted as bearing particularized guarantees of trustworthiness are nevertheless subject to explicit Confrontation Clause scrutiny.

I am aware of the judicial and scholarly discussion regarding the purposes of the Confrontation Clause in general and, in particular, whether the purpose of the

Confrontation Clause is to ensure trustworthiness, confrontation, or both. For purposes of this concurrence, I note that Barnett was unavailable. I conclude that the Barnett statement was offered as "witness" testimony against the defendant for Confrontation Clause purposes, *White* (cite as: 260 Neb. 325, *362, 618 N.W.2d 117, *142) *v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part, and concurring in judgment; Scalia, J., joins), and I understand that the trustworthiness of the statement is the focus of the admissibility analysis of the majority. I further note that the Barnett statement at issue was a custodial statement and that a different analysis might apply to noncustodial statements.

As noted above, if a statement fits within a firmly rooted exception to the hearsay rule, its "[r]eliability can be inferred," *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and it is admitted without further constitutional analysis under the Confrontation Clause. *Id.* The Court has held that firmly rooted exceptions include the following: excited utterances and statements made for purposes of medical diagnosis and treatment, *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); coconspirators' statements, *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); and dying declarations, *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (as described in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

As suggested by the concurrence filed by Justice Breyer in *Lilly*, a criminal defendant would in some cases find cross-examination of the declarant of a firmly rooted

hearsay statement which inculpates the defendant of greater than marginal utility, but because of the per se admissibility of the firmly rooted statement, the defendant is not absolutely entitled under the developed *Roberts* test to confront such a witness against him or her. *See*, also, The Supreme Court, 1998 Term – Leading Cases: I. Constitutional Law, B. Criminal Law and Procedure, 1. Confrontation Clause – "Firmly Rooted" Hearsay Exceptions, 113 Harv. L.Rev. 233 (1999). But *see*, Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1019 (1998), in which the author states that *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986),

> is particularly interesting because it reflects unwillingness on the part of the majority to accept the full implications of the per se aspects of the *Roberts* reliability requirement, as well as implicit recognition that, even if a statement by an unavailable declarant fits within a firmly rooted hearsay exception, its admission may violate the confrontation right.

Thus, for example, where a coconspirator inculpates the defendant in an out-of-court statement, without regard to whether the statement was elicited with the aid of undercover law enforcement, the criminal defendant has no absolute right to cross-examine the declarant of such firmly rooted hearsay, notwithstanding that by an objective standard, adversarial testing would add to the fact finder's assessment of the statement's trustworthiness and that cross-examination of the declarant would be of greater than marginal utility. *See Bourjaily, supra.*

As further noted above, if a custodial statement does not fit within a firmly rooted exception to the hearsay rule but it does bear particularized guarantees of trustworthiness, it is nevertheless subject to the additional constitutional inquiry of whether cross-examination of the declarant would be of greater than marginal utility and whether adversarial testing would add to its reliability. Thus, such statements sought to be admitted as bearing particularized guarantees of trustworthiness are required to undergo a constitutional as well as evidential analysis. The confrontation inquiry regarding adversarial testing and whether cross-examination would be of greater than marginal utility, being of a constitutional dimension, is outcome determinative. Such inquiry is qualitatively unlike the evidential inquiry regarding the particularized guarantees of trustworthiness which considers discrete factual matters surrounding the making of the custodial statement, such as whether the declarant was intoxicated, whether the declarant was asked leading questions, whether the declarant had counsel, et cetera, which, in the aggregate, lead to a conclusion regarding trustworthiness.

Given the controlling nature of the constitutional Confrontation Clause inquiry under the second prong of the developed *Roberts* test as applied to a custodial statement, in my view, if cross-examination would be of greater than marginal utility in assessing the credibility of the declarant and adversarial testing regarding the statement would be of benefit, the Confrontation Clause requires exclusion of the custodial statement, regardless of the assessment of the other factors surrounding the making of the custodial statement. To the extent that the

purpose of the Confrontation Clause is to determine "trustworthiness," the Confrontation Clause inquiry is neither just another trustworthiness inquiry nor a descriptor of the result of the trustworthiness inquiry; if the answer to the Confrontation Clause inquiry is that adversarial testing would be of benefit to assess the reliability of the custodial statement and cross-examination would be of greater than marginal utility, the statement must be excluded.

Whether statements which fit a firmly rooted exception to the hearsay rule should be subject to explicit Confrontation Clause analysis or, conversely, whether statements which do not fit a firmly rooted exception to the hearsay rule but do bear particularized guarantees of trustworthiness should be freed of explicit Confrontation Clause analysis is the subject of scholarly treatment; the resolution of these questions, however, is not within the scope or authority of this concurrence. Rather, because the current jurisprudence requires a Confrontation Clause analysis of the Barnett custodial statement which was proferred by the State as bearing particularized guarantees of trustworthiness and because I conclude that cross-examination of Barnett would be of greater than marginal utility in evaluating Barnett's credibility and that adversarial testing would add to the fact finder's assessment of the reliability of the statement, I conclude, as a constitutional matter, that admission of the Barnett statement violated the defendant's right to confrontation under the Sixth Amendment. *See*, also, Neb. Const. art. I, § 11.

CONCLUSION

I conclude that the *Roberts* test, as it applies to custodial statements for determining the admissibility of statements of unavailable witnesses, has been developed by *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), and *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). If a custodial statement does not fall within the first prong of such test as being a firmly rooted hearsay exception, the statement must be examined under the second prong for particularized guarantees of trustworthiness. With respect to the second prong, I believe, as a practical matter, there are two conjunctive inquiries: first, an evidential hearsay inquiry as to whether the custodial statement contains particularized guarantees of trustworthiness and, second, a constitutional inquiry driven by the Confrontation Clause as to whether the custodial statement is so trustworthy that adversarial testing would add little to its reliability and cross-examination would be of marginal utility.

In the present case, particularly in light of the fact that Barnett's custodial statement of September 28, 1996, ties the defendant to the crimes, I conclude, without regard to an evaluation of the purported features of its trustworthiness, that adversarial testing would add to the assessment of its reliability and that cross-examination would be of greater than marginal utility. Among the matters which objectively ought to be the subject of cross-examination for Confrontation Clause purposes are (1) the nature of Barnett's plea bargain and consequent exposure at sentencing; (2) Barnett's motives to curry favor with the authorities and to exaggerate the defendant's involvement in the crimes while minimizing his own role;

(3) the nature of the relationship between Barnett and the defendant due to their separate sexual relationships with Barnett's girl friend and Barnett's possible motive to seek revenge against the defendant; (4) the nature, motive, and substance of the two statements Barnett gave to the authorities prior to giving the September 28 statement, which prior statements differed considerably from the statement at issue in this case; and (5) the nature, motive, and substance of several statements Barnett made to various persons recanting his involvement in the crimes after making the statement of September 28.

In sum, because I conclude that the defendant's constitutional confrontation right was violated, I agree with the majority's conclusion that the admission of the Barnett statement was reversible error and that the cause should be remanded for a new trial.

McCORMACK, J., joins in this concurrence.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 472-3731

November 15, 2000

J. Kirk Brown
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-97-1069, State v. Jeremy C. Sheets

Appellee/Motion for Rehearing & Brf **filed** 09/22/00 **has been reviewed by the court and the following order entered:** Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE
SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 472-3731

November 15, 2000

J. Kirk Brown
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-97-1069, State v. Jeremy C. Sheets

Appe Mot to Stay Mandate **filed** 09/22/00

has been reviewed by the court and the following order entered:

Motion sustained pursuant to Rule 14 A.(2). Appellee shall notify the Clerk of all proceedings filed in this matter with the Supreme Court of the United States, and all actions taken by said Court in such proceedings.

Respectfully,

CLERK OF THE
SUPREME COURT
AND COURT OF APPEALS

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA Plaintiff, vs. JEREMY C. SHEETS, Defendant.	)	Docket 140 Page 770 **ORDER**

On February 25, 1997 hearing was held on the State's "Notice of Intent to Offer Statements of Unavailable Witness at Trial, Neb. Rev. Stat. Section 27-804(2)(e)" and on State's "Addendum Notice of Intent to Offer Statements of Unavailable Witness at Trial, Neb. Rev. Stat. Section 27 804(2)(e)." The body of the notice and addendum notice provide that: "State is providing notice to offer these statements pursuant to Neb. Rev. Stat Sections 27-804 (2) (c) and 27-804 (2) (e)."

Evidence was presented by the State and the defendant, arguments were made, briefs were submitted, and the matter was taken under advisement.

At the hearing, the issue raised by the State's notice and addendum notice is whether the statements identified in the two notices are admissible as evidence at trial. However, at the hearing and in the State's brief, the State has limited the statements it seeks to offer in evidence to the following:

1. Tape-recorded statements made on September 26, 1996 by Adam Barnett to Richelle

Lanoue. Evidence to be offered through production of said tape records and testimony of Richelle Lanoue and Omaha Police Sergeants Jadlowski and Butera.

2. Tape-recorded statements made on September 28, 1996 by Adam Barnett to Attorney Chris Kelley and Omaha Police Sergeants Jadlowski and Butera. Statements to be offered through production of said tape recording and testimony of Chris Kelly, Esq., and Omaha Police Sergeants Jadlowski and Butera.

Section 27-804(2)(c) provides that an out-of-court statement will not be excluded by the hearsay rule if: 1) the out-of-court declarant is unavailable; and 2) the statement is so contrary to the declarant's penal interest that a reasonable person in a similar position would not have made the statement unless he believed it to be true.

Section 27-804(2)(e) provides that an out-of-court statement will not be excluded by the hearsay rule if it has circumstantial guarantees of trustworthiness and the Court determines that: 1) the statement is offered as evidence of a material fact; 2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and 3) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

The Supreme Court in *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993), has set forth the rules of law that apply to the admissibility of such hearsay statements:

A. If the statements implicate a defendant's penal interest as well as the declarant's penal interest, then a

third element must be satisfied, i.e., that the Court must examine the totality of the circumstances surrounding the making of the statement to determine whether they indicate that the statement is trustworthy.

B. The statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more than that in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantee of trustworthiness.

C. Statements made while the declarant is in police custody and in which the declarant implicates another party are presumptively unreliable.

D. Reliability of statements that fall within the hearsay exception or statements against penal interest may not be inferred, and the proponent of such evidence must carry the burden of demonstrating the trustworthiness and reliability of the statement.

The Court makes the following necessary findings from the evidence:

1. The declarant, Adam Barnett, is deceased and, therefore is, pursuant to the rules of evidence, legally unavailable.

2. One of the two statements sought to be admitted by the State was made in police custody.

3. Both statements made by Adam Barnett were against his penal interest because they tended to subject him to criminal liability.

4. Both statements made by Adam Barnett not only subjected him to criminal liability but incriminated the defendant.

5. The statements are offered as evidence of a material fact.

6. The statements are more probative on the point for which they are offered than any other evidence which the State can procure through reasonable efforts.

Therefore, the Court must examine the totality of the circumstances surrounding the making of the statement and must determine and apply the factors to be considered in determining whether the statements have the guarantees of trustworthiness and reliability.

State v. Hughes, supra, sets forth the factors to be considered under both rules of evidence. The Court determines that the factors are so substantially similar as to conclude that the same factors would apply to both of the relied-upon rules of evidence. Those factors are:

A. Motivation and opportunity to curry favor with the authorities.

B. Whether the statements were made in response to leading questions or were spontaneous.

C. Whether the statements are oral or written.

D. The relationship between the declarant and the witness.

E. Whether the statements were made under oath.

F. Whether the declarant was subject to cross-examination.

G. Whether the declarant subsequently reaffirmed or recanted the statements.

H. Other statements of the declarant consistent or inconsistent with the statements.

Adam Barnett, the declarant, was taken by the Omaha police to central station, was placed in an interview room, advised of his constitutional rights per Miranda, and agreed to talk with police officers about the Kenyatta Bush homicide. Initially, he denied knowing anything about it, then stated that the defendant had told him about it, and then requested an attorney. The interview ceased and later Attorney Chris Kelly was appointed to represent Barnett. Kelly came to central station and consulted privately with Barnett for several hours. No further interviews with Barnett were attempted. Barnett was booked on criminal homicide and was placed in a cell.

On the next day, Barnett requested to speak with his attorney, Chris Kelly. Mr. Kelly came to central station, was briefed by investigators on the evidence that the State had at that point and again consulted for several hours with Barnett whereupon the detectives were advised that Barnett wanted to make a statement. Thereupon, in the afternoon, Sergeant Jadlowski, in the presence of Mr. Kelly, began talking with Barnett, who again cut off the interview and consulted further with Mr. Kelly. Later, in the evening, Mr. Kelly indicated that Barnett wanted to cooperate and make a full and truthful disclosure of the case to the police. After consulting with the County Attorney, a written agreement was reached

between Barnett, Attorney Kelly, and the State that provided that in exchange for a truthful statement by Barnett, he would be charged with second degree murder as opposed to first degree murder. Prior to the statement, in a meeting with Barnett, Kelly, Sergeant Jadlowski, and Deputy County Attorney Leigh Ann Retelsdorf, Barnett was advised by both Attorney Kelly and Ms. Retelsdorf that he should not make any statements unless he would be truthful and that Barnett indicated that he understood and would tell the truth. Thereupon, a taped statement was taken by Sergeants Jadlowski and Butera with Barnett's attorney, Chris Kelly, present during the entire interview. The statement is incriminating to both Barnett and the defendant.

The Court, having listened to the taped statement as well as having reviewed the transcript of same, finds that Barnett knew that he would be charged with murder in the second degree, carrying a penalty of ten years to life imprisonment (which later, it is clear, weighed heavily on him.) He exhibited little, if any, motivation or opportunity to curry favor with the prosecutor. He was represented by an attorney, who had been fully informed of the State's evidence to that point, both before and throughout the interview itself. He knew he must be truthful in order to comply with the terms of the agreement. While his statements incriminated the defendant, they did not exonerate him but instead subjected him to liability of murder in the second degree.

No leading questions, suggesting the answer, were asked of Barnett. Many of his answers, especially the most significant, were lengthy and narrative. No questions, either by their wording or by the tone of the voice,

are in any way coercive in nature. Barnett's answers are responsive to the questions and exhibit no sign of evasiveness or hesitancy over whether or not to fabricate an answer, but rather were spontaneous in tone and in timing.

Prior to Barnett's statements to the police, the police had learned that Barnett had made admissions concerning the murder of Ms. Bush to Jason Lanoue and Richelle Lanoue, husband and wife. After interviewing both Lanoues, Richelle Lanoue was outfitted with a concealed recording device and in cooperation with the Omaha police scheduled a meeting with Barnett. Her conversation with Barnett was recorded and transcribed. Barnett's statements to Richelle Lanoue were not made in police custody and, therefore, the State has no burden to overcome any presumptions of unreliability. His statements to Lanoue, a close friend, bear all the indicia of reliability and trustworthiness, were not the result of leading or coaxing questions, and are consistent with all other statements that Barnett has made.

Subsequent to his statement to the Omaha police, Barnett made statements to a cellmate in the Washington County Jail, to his uncle, Tom Stephanek, and to his mother in a note right before his death that: "I didn't do it." However, from the testimony of his uncle and the statement of the cellmate, what Adam Barnett was telling them was that he did not do the actual, assault and killing of the victim, Kenyatta Bush, but that he was there and was a participant in assisting the defendant who did the actual killing. At best, whether this is consistent with his other statements or is a recantation would be ultimately a question for the jury and their determination of

the credibility and the weight they would give to it. The Court does not consider it significant as a factor in determining whether the State has overcome the presumption that Barnett's statement to the police is unreliable.

Although other evidence tending to corroborate or contradict the content of a hearsay statement is not relevant to the issue of reliability of the hearsay statement, such "other evidence" does not include other statements made by the declarant. Here, Adam Barnett not only made consistent statements after the statements to the Omaha police, but also made prior statements to Jason Lanoue and Richelle Lanoue, which, again, were consistent with his custodial statements as to his involvement in the killing of Ms. Bush. There is not a single statement of the many that Barnett made that differs in any significant way from his custodial statement as to the fact of the killing and the respective involvement or participation by Adam Barnett and the defendant in the killing.

By reason of the foregoing, the Court finds:

1. That the general purposes of these rules of evidence and the interest of justice will best be served by admission of the statements and the evidence.

2. That the State has met its burden of demonstrating trustworthiness and reliability of both statements.

3. That, therefore, both statements are admissible as evidence under either Section 27-804(2)(c) or Section 27-804(2)(e) of the Nebraska rules of evidence.

IT IS SO ORDERED.

Dated this 6th day of March, 1997.

BY THE COURT:

/s/ James A. Buckley
JUDGE

Supreme Court, U.S.
FILED
APR 3 2001
OFFICE OF THE CLERK

(2)

No. 00-1302

In The

Supreme Court of the United States

STATE OF NEBRASKA,

Petitioner,

v.

JEREMY SHEETS,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

J. WILLIAM GALLUP, #11425
Counsel of Record
GALLUP & SCHAEFER
1001 Farnam Street
Omaha, NE 68102
(402) 341-0700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

CAPITAL CASE

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR OPPOSING THE WRIT	9
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Commonwealth, 1999 WL 1256575 (Va. Ct. of App. 1999) (not for publication)..... 13

Anderson v. Page, 161 F. Supp. 2d 770 (N.D. Ill. 1999) (habeas corpus)..... 13

Barrow v. State, 749 A.2d 1230 (Del. 2000)..... 13

Bulls v. Jones, 86 F. Supp. 2d 746 (E.D. Mich.2000) (habeas corpus)..... 12

Commonwealth v. Young, 748 A.2d 166 (Penn. 2000) (on reargument)..... 13

Dearing v. Commonwealth, 524 S.E. 2d 121 (Va. 2000)..... 13

Lilly v. Commonwealth, 523 S.E. 2d 208 (Va. 1999).... 13

Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999)..... 9, 10, 12

Moltz v. Commonwealth, 2000 WL 527730 (Ct. of App. of Va. 2000) (not for publication)..... 13

Pace v. Commonwealth, 2000 WL 5586322 (Ct. of App. of Va. 2000) (not for publication)..... 13

People v. Farrell, 2000 WL 177685 (Col. Ct. of App. 2000) (not released for publication)..... 12

People v. Quick, 720 N.E. 2d 1137 (App. Ct. of Ill. 1999)..... 13

Rankins v. Commonwealth, 523 S.E. 2d 524 (Va. Ct. of App. 2000)..... 13

State v. Dinkins, 529 S.E. 2d 557 (Ct. of App. of S.Car. 2000)..... 13

TABLE OF AUTHORITIES – Continued

Page

State v. Harris, 525 S.E. 2d 208 (Ct. of App. of N.Car. 2000) 13

State v. Lopez, 993 P. 2d 727 (N. Mex. 1999) 13

State v. Madrigal, 721 N.E. 2d 52 (Ohio 2000) 13

State v. Thompson, 2000 WL 310461 (Ct. of App. of Ohio 2000) (unpublished) 13

State v. Troupe, 2000 WL 336520 (Ct. of App. of Ohio 2000) (unpublished) 13

United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) 12

United States v. Taylor, 188 F.3d 505, 1999 WL 617896 (4th Cir. 1999) (unpublished) 13

Williams v. Commonwealth, 523 S.E. 2d 166 (Va. 1999) 13

York v. Page, 528 S.E. 2d 823 (Ct. of App. of Ga. 2000) 13

STATEMENT OF THE CASE

Bill Jadlowski was a sergeant, employed by the City of Omaha, and he had been involved in the investigation into the death of Kenyatta Bush. (Volume I, 2:5-16). Jadlowski interviewed Adam Barnett after Barnett had been arrested and placed in custody at Central Police Station. (Volume I, 17:5-25). This was the first interview of Barnett while Barnett was in police custody and lasted approximately one hour. (Volume I, 18:1-8). During this initial interview Barnett denied any involvement in the killing of Bush but claimed that he had been told by Jeremy Sheets that Sheets had killed Bush. (Volume I, 18:9-16). That interview was concluded when Barnett demanded an attorney and an attorney was subsequently appointed to represent Barnett. (Volume I, 18:17-25; 19: 1-25). Barnett was formally booked on a homicide charge shortly after an attorney had been appointed to represent him and after the first statement given to Jadlowski. (Volume I, 21:19-23). Subsequent to the appointment of an attorney for Barnett, the attorney contacted Jadlowski and advised Jadlowski that Barnett wished to make a second statement to police. (Volume I, 23:14-15). A second statement from Barnett was taken on September 28, 1996. That statement was cut off by the attorney for Barnett. (Volume I, 23:16-25). After the interview had been terminated the attorney for Barnett said his client wanted to make a statement, but he also wanted to know what was going to happen to him. At that time the county attorney was consulted and brought into the discussion. (Volume I, 25:9-21). The county attorney entered into an agreement with Barnett whereby Barnett would be allowed to plead guilty to a charge of second degree murder in return for

giving a statement and testifying truthfully at any trial (Volume I, 27:1-18). Following the plea agreement, Barnett's attorney indicated that Barnett was willing to make a statement. (Volume I, 28:6-16). Barnett gave a tape-recorded statement after entering into the plea agreement. (Volume I, 30:1-10). Barnett committed suicide after giving the tape-recorded statement. (Volume I, 33:7-10). Jadlowski interviewed Barnett a total of three times at Central Police Headquarters. (Volume IV, 805:10-15). In the second interview of Barnett conducted by Jadlowski and other detectives, Barnett stated that he and Sheets had come in contact with Bush about 2:30 in the afternoon. (Volume III, 753:5-22). In that statement Barnett stated that Bush was asked to get into the car for purposes of going out to party and smoke marijuana and that Bush had gotten into the vehicle willingly upon the invitation. (Volume III, 754:11-18). Barnett also stated that Sheets had asked Bush if she liked white meat and that Bush responded she would try it. (Volume III, 755:22-25; 756:1-2). According to this second statement the parties then drove to Dodge Park. After getting to Dodge Park the three got out of the vehicle. (Volume III, 758:6-17). Barnett then told Jadlowski that he observed Sheets stabbing Bush 10-20 times. (Volume III, 759:14-17). Barnett made no mention of either rape or sexual assault and, according to Barnett in this statement, he was standing when he observed the stabbing. (Volume III, 760:2-10). Barnett stated that after the killing the body was placed in a trash bag. The trash bag was placed in the trunk of the car and they left Dodge Park. (Volume III, 761:7-25). After leaving the park the body was taken to another area and deposited somewhere off the road. (Volume III, 762:

1-25). During this second statement given to Jadlowski, Barnett started to cry and his attorney stopped the interview. While Barnett was crying he told Jadlowski: "I wasn't there." (Volume III, 763:20-25; 764:1-8). After telling Jadlowski that he was not there, Jadlowski went over to Barnett, put his hand on his shoulder, and asked Barnett: "What are you trying to tell me?" Barnett responded for a second time that he was not there. (Volume III, 764:7-17). Jadlowski found discrepancies in the first interview with Barnett and the second interview with Barnett. (Volume III, 766:4-25). Jadlowski also found discrepancies between the things Barnett said in his second interview at the police station and the statement he made to Jason LaNoue. (Volume III, 766:20-25; 767:1-4). The discrepancy consisted of the fact that in the interview on Saturday Barnett did not admit any involvement in the murder. He simply said in that interview that he was present and helped hide the body after the killing. (Volume III, 767:10-18). Another discrepancy was the fact that Barnett claimed that the girl had been picked up voluntarily at 2:30 in the afternoon when the detectives knew she had disappeared in the morning. (Volume III, 767:19-25; 768:1-9). The detectives also knew that Bush would never have gotten into a car with a stranger. (Volume III, 769:1-6). The second interview that Jadlowski conducted with Barnett on Saturday afternoon was clearly a different account than he had acquired on Saturday night when he got Barnett's confession. (Volume III, 770:15-18). Barnett never explained to Jadlowksi any of the inconsistencies in his statement. (Volume III, 771:1-25; 772:2-25; 773:1-25). Jadlowski concluded, after the second interview of Barnett, that Barnett was not being honest in

the second interview and that Barnett was not telling the truth in the second interview. (Volume III, 774:11-25; 775:1-10). Jadlowski never asked Barnett why, in one of his statements to Jadlowski, he said Sheets stabbed the woman 10-20 times in the chest, and in his other statement he said Sheets stabbed her only 3-4 times in the chest. (Volume III, 781:1-10). Jadlowski admitted that the two statements were very significant, but he did not question the discrepancy because he knew from the autopsy report that the woman had not been stabbed 10-20 times and that Barnett had not been accurate at that point. (Volume II, 781:11-18). Jadlowski again did not ask Barnett to explain the discrepancy in his statement when he first stated there had not been a sexual assault and when he later said there had been a sexual assault. (Volume III, 782:8-15). Jadlowski said he never asked Barnett to explain the discrepancy because it was obvious to Jadlowski that Barnett was not being truthful. (Volume III, 782:17-22).

Jadlowski admitted there was no physical evidence to connect Respondent to the crime. (Volume III, 794:11-21; 795:1-3).

Detective Jadlowski testified that he interviewed Barnett three times and that Barnett gave three different statements. He testified that every time he talked to Barnett, Barnett gave a different account. Jadlowski also admitted that Barnett gave different accounts to his girlfriend, Chrissy, gave a different account to Richelle LaNoue and that he gave different accounts at different times to virtually everyone he talked to. (Volume IV, 830:1-25).

The State of Nebraska had two tapes prepared, exhibits 46 and 47, which were an edited version of the original taped statement from Barnett. (Volume II, 473: 17-23). The tapes were offered by the prosecution. (Volume II, 474:12-14). The exhibits were objected to by counsel for Respondent on the grounds that they constituted hearsay and violated the Confrontation Clause. The Court overruled the objection and received the exhibits. (Volume II, 475:3-19). The exhibits were then played to the jury.

Barnett's taped statement commences in Volume II, 478:1-527:6). The statement commences with Barnett stating that he and Respondent had been cruising around all night tripping acid, piggybacking them. (Volume II, 480:22-25). He stated that they drove to North High about 10:00 in the morning where they kidnapped a girl and took her to Dodge Park where they decided they were going to rape her. (Volume II, 481:4-25). Barnett stated that Respondent was having intercourse with the victim, beating her with his fists, from her waist to her head, while Barnett was not doing anything. (Volume II, 496:20-25; 497:1-16). The victim appeared to be unconscious. After the victim was unconscious Barnett stated that the Respondent took his knife and stabbed the victim after making the statement: "I am going to kill this nigger bitch. You got a problem with that?" (Volume II, 497:15-25; 498:1-16). According to Barnett, Respondent stabbed the victim 3-4 times. (Volume II, 500:10-13). The Respondent was having intercourse with the victim while he was stabbing her. (Volume II, 500:22-25). Barnett stated that the victim was stabbed between her "boob area to neck area". (Volume II, 501:1-8).

The interrogation of Barnett started with Detective Jadlowski asking a leading question: "Adam, I want to ask you a pointed question right out of the gate. Is Kenyatta Bush dead because she's black?" (Volume II, 484:17-19). Again, Jadlowski asked Barnett another leading question: "Was there any conversation between you and Jeremy in the vehicle before you picked her up as to you guys picking up a black girl specifically?" (Volume II, 485:1-6). According to Barnett, after the killing the body was placed in a garbage bag and it was deposited in another location. (Volume II, 504:19-25; 50-5:1-25). After the body had been moved Barnett and Respondent went to Barnett's house where they washed out the trunk of the car. (Volume II, 515:1-25). In the taped statement Barnett admitted to Jadlowski that he had not been truthful with other people he had discussed the matter with. (Volume II, 520:9-20). Barnett also admitted to Jadlowski that he had told his girlfriend, Chrissy, that everything he had said about the killing had not been true. (Volume II, 526:7-12).

Nancy Sheets is the mother of Jeremy Sheets and she went to Council Bluffs, Iowa on September 23, 1992 to look at a Camero automobile that the Respondent was planning to buy. (Volume IV, 838:15-22). She went back to Council Bluffs on the 24th and 25th of September. The Respondent did not have a car prior to September 24, 1992. (Volume IV, 841: 21-25). Ms. Sheets was positive that her son purchased the car on September 24, 1992 because she purchased her new car the following day. (Volume IV, 842:1-14).

Mary Barnett is the mother of Adam Barnett. (Volume IV, 846:8-10). She testified that she visited her son every

Wednesday afternoon while he was in jail in Washington County. (Volume IV, 846:20-25). She also talked to her son every evening on the telephone while he was in jail. (Volume IV, 847:1-4). Adam Barnett told his mother in her visits and in her telephone conversations with him that he was not present when Bush was killed and it was just a drunk thing that started at a party. (Volume IV, 847:5-8). Ms. Barnett testified that she told her son to tell the truth and everything would be alright and her son responded to that advice by saying he was going to go to the preliminary hearing and get up and would tell them the truth, exactly what happened, and that they were not involved and because he could not send anybody else down for a drunken, stupid thing he started and could not get out of. (Volume IV. 847:14-25; 848:1-4). Ms. Barnett testified that her son's specific words were: "He said fuck it. I am going to go to the preliminary hearing and I am going to tell them the truth." (Volume IV, 848:7-9). Present at this admission of Barnett was his girlfriend, Chrissy, the mother of his child. (Volume IV, 848:10-15). Ms. Barnett testified that Respondent and her son were employed at Kentucky Fried Chicken in September, 1992 and worked evenings ninety-nine percent of the time. (Volume 848:22-25; 849:1-3). She also testified that Respondent did not have a car at that time and usually got to work by riding with either Jason LaNoue or Josh Tyson. (Volume IV, 849:7-15). Ms. Barnett testified that her son's reputation for truthfulness was terrible. (Volume IV, 850:23-25; 851:1-3).

Christine Kelly was the mother of Adam Barnett's child. (Volume IV, 860:14-25). She communicated with Barnett after he had been placed in jail both by telephone

and actual visits at the jail. (Volume IV, 863:19-25; 864:1-6). In all of her discussions with Adam Barnett after he had been placed in jail, he told Chrissy they had not done it. (Volume IV, 864:7-11). Chrissy testified that she had asked Barnett why he had never explained to the police that it was all a lie and he told her that he had told them it was all a lie, that it was just a bunch of drunk bull, and they would not believe him. (Volume IV, 865:7-18). Barnett told Chrissy that when he got to trial he was going to tell the truth and the truth was that they did not do it. (Volume IV, 865:19-24). Chrissy further testified that Barnett's reputation in the community for truthfulness was bad and that he had a history of telling tall tales. (Volume IV, 866:1-5). Chrissy admitted in her testimony that she had had a sexual relationship at one time with the Respondent and that Barnett had gotten very disturbed and that Chrissy had tried to put all the blame on Respondent (Volume IV, 866:10-25). Chrissy testified that Barnett left a suicide note in which he stated: "they did not do it" (Volume 870:20-25; 871:1-5).

Brian Hunkins testified that he was in the Washington County Jail and was a cell mate with Adam Barnett. (Volume III, 700:14-25). He testified that his cell mate, Barnett, was preparing to go to Court to testify in the case of *State v. Sheets*. (Volume III, 701:13-23). Hunkins testified that Barnett told him that neither he nor Sheets had any involvement in the Bush murder. (Volume III, 701:24-25; 702:1-4). Hunkins testified that Barnett said he was going to try to clear the matter up and that he had made the story up to impress some people at a party. (Volume III, 702:8-11). It was after that conversation that he found Barnett hanging in his cell. The suicide was

shortly after the statement Barnett made to Hunkins. (Volume III, 702:10-23). Hunkins testified he had told the authorities the same thing prior to his testimony at trial. (Volume III, 703:6-8).

Kay Sheets is the wife of Respondent and she and Respondent were living in Maine where he was serving in the Navy. (Volume III, 729:5-21). They were living in Maine at the time he was arrested there. (Volume III, 730:3-7). Mrs. Sheets testified that she received a telephone call from Barnett from the Washington County Jail and she had a conversation with Barnett that lasted about fifteen minutes. In that conversation Barnett told her that he hoped she did not hate him because he had ruined Respondent's life and Mrs. Sheets' life and he had told her that he had just been bullshitting and that nothing he had said was true. (Volume III, 732:20-25 733:1-25; 734:1-4).

REASONS FOR OPPOSING THE WRIT

WHETHER THE DECISION OF THE NEBRASKA SUPREME COURT CORRECTLY APPLIED THE TEACHINGS OF *LILLY v. VIRGINIA*, 527 U.S. 116, 119 S.Ct. 1887, 144 L. Ed. 2d 117 (1999) TO RESPONDENT.

ARGUMENT

Respondent was convicted of capital murder and sentenced to death in the electric chair. The only evidence linking the Respondent with the crime was a statement of an alleged accomplice made while in custody. When the alleged accomplice died prior to trial, the statement was

offered and received as an exception to the hearsay rule on the grounds that it was a statement against penal interest. Objections to the offer were made on the grounds that the statement violated the Respondent's right to confrontation under the Sixth Amendment.

After Respondent's case had been argued before the Nebraska Supreme Court, the Petitioner asked that Court to postpone its decision until after this Court had decided *Lilly*, supra, which was awaiting oral argument at the time Respondent's case had been taken under advisement by the Nebraska Supreme Court. The Nebraska Supreme Court complied with the request and withheld its opinion until after *Lilly* had been decided.

The Petitioner, after the decision in *Lilly* was announced, asked the Nebraska Supreme Court for permission to write a supplementary brief explaining the meaning of *Lilly*. The Nebraska Supreme Court granted the request, so Petitioner had an opportunity to present the same arguments to the Nebraska Supreme Court that it now makes to this Court in its petition for a writ of certiorari.

This Court need only read the opinion of the Nebraska Supreme Court in order to determine whether it understood the teachings of *Lilly*. The opinion could have been written by Diogenes, judging from its clarity.

The Nebraska Supreme Court reiterated this Court's often quoted rule that a statement made to police by an alleged accomplice which incriminates another person is presumptively unreliable. *Lilly*, of course, recognized this rule.

Petitioner ignores the important fact that the alleged accomplice, Barnett, recanted at least *four times*.

Petitioner, stating a desire to discuss how the facts demonstrate the reliability of Barnett's taped statement, totally ignores this matter of recanting by Barnett because it can't reconcile it with reliability. Like a politician when asked a difficult question, the Petitioner simply says nothing. Since Petitioner seems determined to demonstrate the reliability of the taped statement of Barnett, the Court should look at the facts the Petitioner chooses to ignore in assessing that reliability. First, Petitioner states that Barnett never shifted the blame to Sheets. Petitioner must suffer from astigmatism, because the record shows that, according to Barnett, Sheets dragged the girl into the car; Sheets beat the girl; Sheets raped the girl and Sheets killed the girl. Barnett was just there. There was almost a total shifting of blame to Sheets. The homicide, according to Barnett, was blamed exclusively upon Sheets. To say that Barnett made no attempt to exculpate himself is to ignore the record.

If one wishes to question the reliability of Barnett's statement, one must note that the final statement, the one received into evidence, was the *third* statement taken from Barnett. The first two were all different, and at the conclusion of each of them, Barnett stated: "I wasn't there." Following the second statement and before making a third statement, the attorney for Barnett said his client wanted to know what was going to happen to him. At that time the County Attorney appeared and agreed to let Barnett plead to a charge of second degree murder in return for giving a statement. (Vol.I, 27:1-18) The third and final statement was then recorded. If asking for a

deal prior to making a statement and getting that deal does not raise serious questions about the statement's reliability, nothing will. The statement was purchased by the State.

None of the above is mentioned by Petitioner in its review of the "facts". If the statements in *Lilly* were untrustworthy, *a fortiori* they are in this case.

Lilly wasn't hard to understand. The decision reversing the Virginia conviction was unanimous. Although four concurring opinions provided differing explanations about how other cases might be decided, there was complete agreement that the prosecution could not use a custodial confession that inculpated the defendant solely by showing that the non-testifying accomplice had inculpated himself in other parts of the confession.

Nebraska isn't the only jurisdiction that understood the meaning of *Lilly*. In the first year after the decision, the lower courts have reversed or vacated ten convictions in which a trial Court had admitted an accusatory confession of an accomplice on the ground the confession was a statement against penal interest. One of the cases was *Lilly* itself, on remand, after the lower Court found the constitutional error was not harmless. Six other convictions were also murder or capital murder convictions, two involved non-homicide shootings, and one was a drug prosecution. The cases apply *Lilly's* holding that the hearsay exception for statements against penal interest is not sufficient to overcome a confrontation objection. The cases are: *United States v. Gomez*, 191 F.3d 1214 (10th Cir. 1999); *Bulls v. Jones*, 86 F. Supp. 2d 746 (E.D. Mich. 2000) (habeas corpus); *People v. Farrell*, 2000 WL 177685 (Col. Ct.

of App. 2000) (not released for publication); *Barrow v. State*, 749 A.2d 1137 (App. Ct. of Ill. 1999); *People v. Quick*, 720 N.E. 2d 1137 (App. Ct. of Ill. 1999); *Commonwealth v. Young*, 748 A.2d 166 (Penn. 2000) (on reargument); *Lilly v. Commonwealth*, 523 S.E. 2d 208 (Va. 1999); *Williams v. Commonwealth*, 528 S.E. 2d 166 (Va. Ct. of App. 2000) (on rehearing en banc); *Rankins v. Commonwealth*, 523 S.E. 2d 524 (Va. Ct. of App. 2000); *Aguilar v. Commonwealth*, 1999 WL 1256575 (Va. Ct. of App. 1999) (not for publication).

A second group of cases further demonstrate the impact of *Lilly*. In these cases the Court recognized that the trial Court created constitutional error in admitting hearsay solely on the ground the statement was against the declarant's penal interest. While the lower courts still affirmed the convictions in each case, it was only because the constitutional error was harmless beyond a reasonable doubt. The cases are: *United States v. Taylor*, 188 F.3d 505, 1999 WL 617896 (4th Cir. 1999) (unpublished); *Anderson v. Page*, 161 F. Supp. 2d 770 (N.D. Ill. 1999) (habeas corpus); *York v. State*, 528 S.E. 2d 823 (Ct. of App. of Ga. 2000); *State v. Lopez*, 993 P.2d 727 (N.Mex. 1999); *State v. Harris*, 525 S.E. 2d 208 (Ct. of App. of N. Car. 2000); *State v. Madrigal*, 721 N.E. 2d 52 (Ohio 2000); *State v. Troupe*, 2000 WL 336520 (Ct. of App. of Ohio 2000) (unpublished); *State v. Thompson*, 2000 WL 310461 (Ct. of App. of Ohio 2000) (unpublished); *State v. Dinkins*, 529 S.E. 2d 557 (Ct. of App. of S. Car. 2000); *Dearing v. Commonwealth*, 524 S.E. 2d 121 (Va. 2000); *Pace v. Commonwealth*, 2000 WL 558622 (Ct. of App. of Va. 2000) (not for publication); *Moltz v. Commonwealth*, 2000 WL 527730 (Ct. of App. of Va. 2000) (not for publication).

Lilly was a tenfold beacon in the night illuminating the path for trial courts. As the above cited cases demonstrate, the lower courts have had no trouble understanding *Lilly*. The Nebraska Supreme Court wrote a reasoned opinion applying the lessons it learned from *Lilly* to the instant case.

CONCLUSION

The Nebraska Supreme Court correctly decided the case and the decision needs no further review.

The Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

J. William Gallup, #11425
1001 Farnam Street, #300
Omaha, NE 68102
(402) 341-0700